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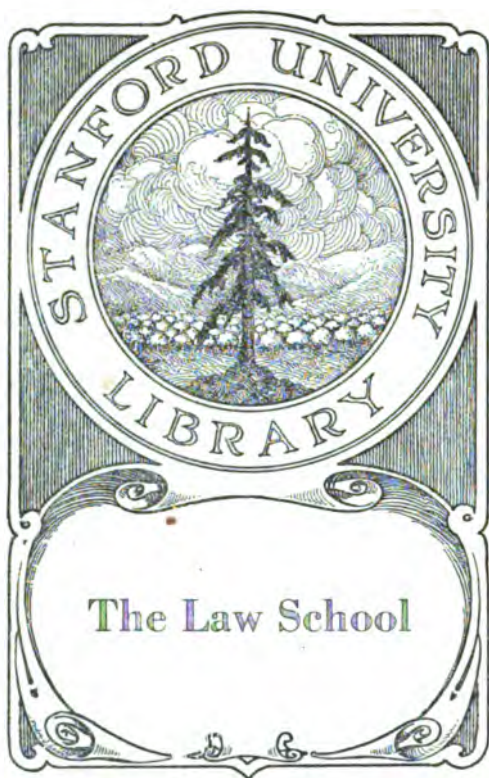
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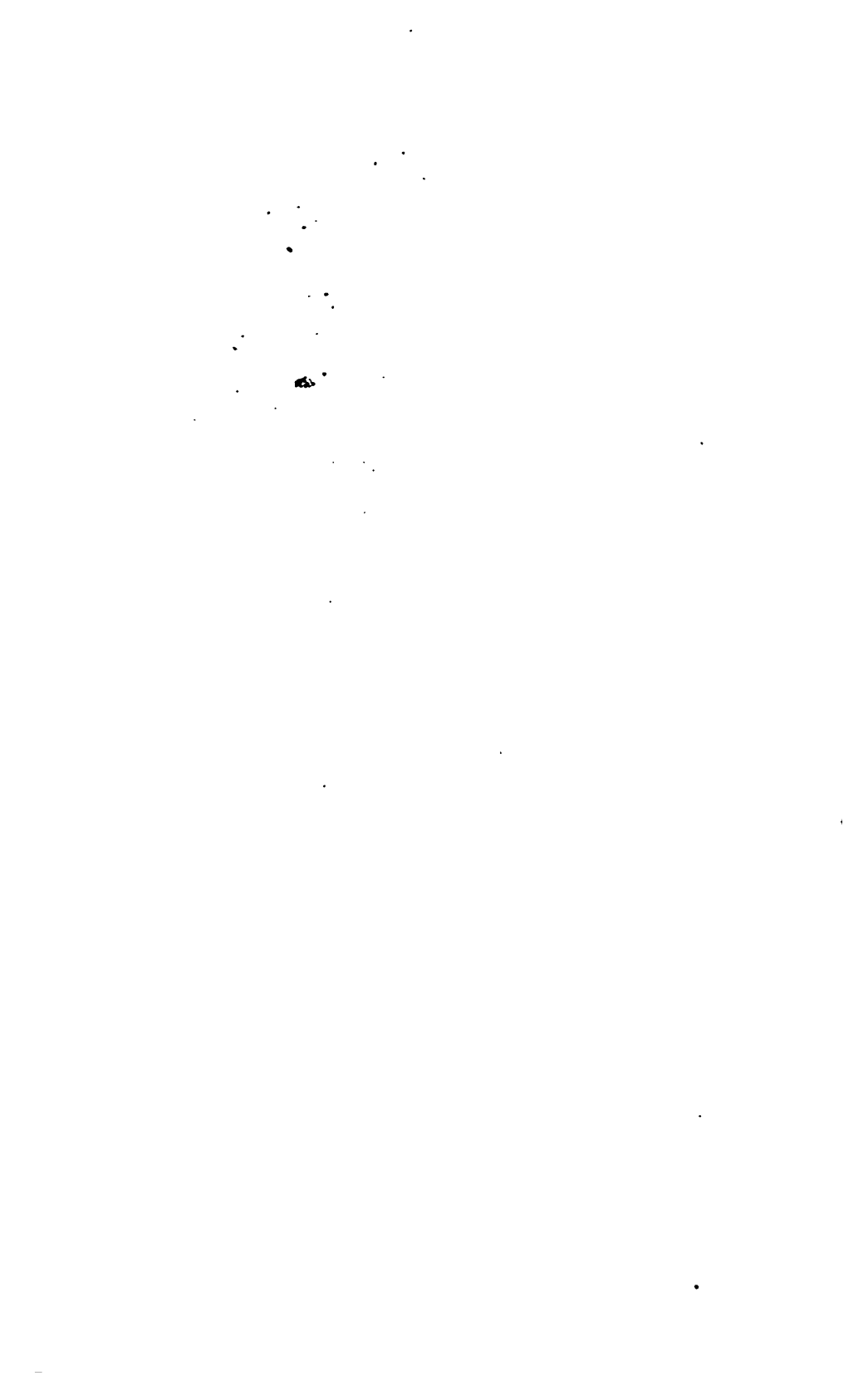
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ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

Gillispie

EDITED BY

HON. GEORGE SHARSWOOD.

VOL. LXVIII.

CONTAINING

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BY
JOHN LEYCESTER ADOLPHUS, OF THE INNER TEMPLE, Esq.
AND
THOMAS FLOWER ELLIS, OF THE MIDDLE TEMPLE, Esq.,
BARRISTERS AT LAW.


NEW SERIES.

VOL. XIV.

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JUDGES
OF
THE COURT OF QUEEN'S BENCH,
DURING THE PERIOD OF THESE REPORTS.

The Right Hon. THOMAS LORD DENMAN, C. J.

Sir JOHN PATTESON, Knt.
Sir JOHN TAYLOR COLERIDGE, Knt.
Sir WILLIAM WIGHTMAN, Knt.
Sir WILLIAM ERLE, Knt.

ATTORNEY-GENERAL.
Sir JOHN JERVIS, Knt.

SOLICITOR-GENERAL.
Sir JOHN ROMILLY, Knt.



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CASES
ARGUED AND DETERMINED
IN
THE QUEEN'S BENCH,

Trinity Vacation,

XIII. VICTORIA. 1849.

Gillaspie

(TRINITY VACATION CONTINUED FROM VOL. XIII.)

AYRTON and Another *v.* ABBOTT and Another. July 5.

Semble: That the statutes 27 H. 8, c. 20, 32 H. 8, c. 7, and 2 & 3 Ed. 6, c. 13, for the payment and recovery of "offerings," "oblations," and "obventions," and 24 H. 8, c. 12, s. 2, prohibiting appeals to Rome in causes relative to right of "tithes, oblations, and obventions," include mortuaries.

But mortuaries are not within stat. 7 & 8 W. 3, c. 6, s. 2, which authorizes justices of the peace to adjudicate upon complaints of subtraction of "small tithes, offerings, oblations," and "obventions."

Justices of the peace made an order under the last-mentioned statute, reciting a complaint that certain parishioners had refused to pay to the parties entitled the oblations, obventions, and other customary dues and payments arising, &c.; and the justices by their order adjudicated that there was due from those parishioners the sum of 10*s.*, being the amount and value "of the said oblations, obventions, and other customary dues and payments which have become due," &c., "from them," &c., and ordered them to pay the said sum, &c. In an action of trespass for a distress made under the order:

Held, that evidence was admissible to show that the 10*s.* were claimed before the justices in respect of a mortuary; there not being, on the face of the order, any finding of fact by which that extrinsic evidence was excluded.

And that, in the absence of such evidence, the order would be bad for uncertainty.

TRESPASS for breaking and entering the shop of the plaintiffs at Colne in Lancashire, and seizing and distraining pieces of cloth of the plaintiffs therein. Plea: Not guilty, by statute. On the trial, before *ROLFE, B., at the Lancaster Spring assizes, 1847, a verdict was taken for the plaintiffs for 40*s.* damages, subject to the opinion of [*2

this Court on a special case. The material parts of the case were as follows.

The plaintiffs are the executors of John Watson, who died at Colne, in the parish of Whalley in Lancashire, on the 15th of April, 1844, leaving personal assets of the value of 40*l.* and upwards, after payment of his debts. Up to and at the time of his death he was a house-keeper, residing and carrying on the business of a pawnbroker at Colne aforesaid; and the pieces of cloth were part of his stock in trade, and, at the time of the seizure and distress, were the property of the plaintiffs as his executors.

On the 13th of August, 1845, the following complaint in writing was made to the defendant Abbott, who, and the other defendant Garnett, then and from thence until and at the time of the commencement of the suit, were justices of the peace acting in and for the said county; viz.:

"To the Reverend Philip Abbott, Clerk, one of Her Majesty's justices of the peace in and for the county of Lancaster. Edmund Hopwood, of," &c., "agent to John Taylor, of Whalley in the said county, Esquire, the Rev. John Master Whalley, of Clerk-hill withip Whalley aforesaid, clerk, and William Whalley, of Whalley aforesaid, Esquire, complaineth that he, the said E. Hopwood, did, by the space of twenty days and upwards before the day of the date hereof, demand of Henry Ayrton, of Colne in the said county, draper, and Benjamin Watson, of the same place, cotton manufacturer, executors," &c., "of John Watson, late of," &c., "deceased, as such executors as aforesaid, the oblations, obventions, and other customary dues and payments arising within the parish of Whalley aforesaid, and which have justly become due within two years now last past from them the said H. A. and B. W., as such executors as aforesaid, unto them the said J. Taylor, J. M. Whalley, and W. Whalley, to the value of 10*s.*: and that the said H. A. and B. W. did, upon the said demand, respectively refuse, and do yet respectively refuse, to pay, and have not nor has either of them paid, the *3] same, nor any part thereof. *The said complainant, as such agent as aforesaid to the said J. Taylor, J. M. Whalley and W. Whalley, therefore prayeth such redress in the premises as to you shall seem meet, and as to the law doth appertain. Signed the 13th day of August, A. D. 1845. EDMUND HOPWOOD."

On the same 13th August a summons was issued by defendant Abbott, and served upon the plaintiffs. It was addressed to the Constable of the township of Colne, and all others, &c. It recited the complaint of Hopwood, agent to John Taylor, &c., that Ayrton and Watson, executors, &c., "have, for above the space of twenty days before the time of the said complaint so made unto me as aforesaid, respectively refused to pay unto the said J. Taylor, J. M. Whalley, and W. Whalley, and have not, nor has either of them, yet paid, the oblations, obventions, and other customary dues and payments arising within the parish of Whalley aforesaid, and which have justly become due within two years now last past from them the said H. A. and B. W. as such executors as aforesaid unto them the said J. Taylor," &c., "to the value of 10*s.*" The constable was therefore commanded to summon Ayrton and Watson to appear before such two of Her Majesty's justices for the county as

should be present at the Sessions room in Clitheroe in the said county on 21st August then instant, &c., to answer, &c. Signed and sealed by defendant Abbott.

On the said 21st August, the plaintiffs, in pursuance of the said summons, appeared before the defendants and two other magistrates of the said county, to answer to the said complaint: and, on that occasion, the attorney for the said J. Taylor, J. M. Whalley and W. Whalley, in support of the said complaint, claimed against the defendants, as executors, &c., the sum of *10s., as being a mortuary alleged to be due and payable by custom to the said J. Taylor, J. M. Whalley, and [*4 W. Whalley, as lay rectors of the parish of Whalley, on the death of any resident housekeeper in the township of Colne aforesaid, in the parish aforesaid, having movable goods of the value of 40*l.* over and above just debts. Whereupon the now plaintiffs disputed before the said justices the existence and validity of the alleged custom, the jurisdiction of the justices in the matter, and the sufficiency of the complaint and summons. The said rectors produced evidence in support of their claim: and, after several adjournments, the following order was made under the hands and seals of the defendants.

"Whereas, on," &c., "complaint," &c., "was made unto the undersigned, the Rev. Philip Abbott, clerk, one of Her Majesty's justices of the peace within and for the county of Lancaster, by Edmund Hopwood, of," &c., "agent," &c., "that Henry Ayrton, of," &c., "and Benjamin Watson, of," &c., "executors," &c., "did, for the space of twenty days and upwards next before the day of the date of the said complaint, so made," &c., "and by the space of twenty days after demand thereof made upon them as such executors as aforesaid, respectively refuse to pay unto the said J. Taylor, J. M. Whalley and W. Whalley, and had not, nor had either of them the said H. A. and B. W. at the time of the said complaint then paid, but still did respectively refuse to pay, the oblations, obventions, and other customary dues and payments, or any part thereof, arising within the parish of Whalley in the said county, and which had justly become due within two years then last past from them the said H. A. and B. W. as such executors," &c., "unto," &c., "to the value of 10*s.*:" prayer of redress by the complainant, as such agent, &c., was then recited. "Whereupon," &c.: the order then recited grant of the summons by the said justice; attendance on the summons; adjournment to 4th September; and attendance of Ayrton and Watson on that day "before us the said justices then in petty session assembled at Clitheroe aforesaid in pursuance of the said adjournment." It then proceeded: "Now we, the said Philip Abbott, and also Jeremiah Garnett, Esquire, being both of us such justices as aforesaid, and being so assembled at Clitheroe aforesaid on the said 4th day of September, and being neither of us patron of the parish church of Whalley aforesaid, nor any way interested in the said oblations, obventions, and other customary dues and payments, or any of them, *having on that day, that is to say on the said 4th day of September, fully and duly examined the truth and justice of [*5 the said complaint upon oath, and having on that day also heard the said H. Ayrton and B. Watson (by their attorney) in their defence, and having on that day," &c. (adjournment of the case for consideration), "do, on this present 18th day of September, after due and mature consideration," &c., "find and determine that there is justly due from them the said H. A. and B. W., as such executors as aforesaid, to the said J. Taylor, J. M. Whalley and W. Whalley, the sum of 10*s.* for and in respect

of and being the amount and value of the said oblations, obventions, and other customary dues and payments which have become due and payable from them the said H. A. and B. W., as such executors as aforesaid, within two years next before the time of making the said complaint. And we do therefore adjudge and order the aforesaid H. A. and B. W., as such executors as aforesaid, to pay or cause to be paid unto the said J. Taylor, J. M. Whalley, and W. Whalley, or to one of them on behalf," &c., "or to the said E. Hopwood, their recognised agent for this turn, the aforesaid sum of 10s., and also the sum of 10s. for the costs and charges of the said J. Taylor, J. M. Whalley and W. Whalley in prosecuting," &c. "for the recovery," &c. "Given," &c. (18th September 1845).

No other claim but for the alleged mortuary was ever made before the said justices; and the said sum of 10s. in the order first mentioned is the 10s. claimed as such mortuary.

The plaintiffs were served with the order, and refused to pay: and the now defendants made and issued their warrant of distress, directed to the constable of Colne, to the churchwardens of the parish of Whalley, and all others whom this might concern. The warrant, after reciting the complaint and summons, proceeded:

"And whereas we the said justices, being neither of us patron of the parish church of Whalley aforesaid, nor any way interested in any of the said oblations, obventions, or other customary dues and payments, have duly examined the truth and justice of the said complaint, and have ordered the said H. A. and B. W., as such executors as aforesaid, to pay or cause to be paid unto the said John Taylor," &c., "or to one," &c., "or to the said E. Hopwood," &c., "the sum of 10s. for and in respect of and being the amount and value of the said oblations, obventions, and other customary dues and payments which have become due," &c. (as in the order), "from them," &c., "to the said John Taylor," &c., "within two years," &c., "together with the sum of 10s. for the costs," &c. (as in the order), "which said sums make in the whole *6] the sum of 1l.; And whereas it appeared unto us the said justices that the said H. A. and B. W., as such executors as aforesaid, had due notice of our said order for the space of ten days and upwards before the day of the date hereof, but have," &c. (refusal of payment): "These are therefore to command you jointly and severally that you, or some one of you, do forthwith distrain the goods and chattels of the estate and effects of the said John Watson, deceased; and, in case," &c.; direction to sell if the 1l. and reasonable charges of distress be not paid or tendered within four days next after distress made, and to pay the 1l. out of the proceeds: costs of distress to be retained: overplus, if any, returned. "Given," &c. (12th December, 1845). "PHILIP ABBOTT (L. S.) JEREMIAH GARNETT (L. S.)."

The case then stated that an officer acting under the warrant entered plaintiff's shop in the declaration mentioned, and seized the cloth therein also mentioned as a distress, &c., and detained the same till plaintiffs paid the 10s. and costs under protest. Whereupon plaintiffs gave due notice of action, &c.

"The defendants contend that, if the documents show jurisdiction, none of the other facts stated in the case, touching the questions which the defendants, as justices, have decided, are admissible in evidence; and the Court is to determine whether such facts or any of them are so admissible.

"If, upon the whole case, excluding those facts which the Court shall

think not admissible in evidence, the Court shall be of opinion that the action is maintainable, the verdict entered for the plaintiffs is to stand: but, if, on the other hand, the Court shall be of opinion that the action is not maintainable; the said verdict is to be set aside, and in lieu thereof a nonsuit or verdict for the defendants is to be entered." Liberty to either party to turn the case into a special verdict, omitting those facts which the Court shall determine not to be admissible as evidence.

The case was argued in last Easter term.(a)

**Joseph Addison* for the plaintiff.—The defence must rest on [*7 stat. 7 & 8 W. 3, c. 6.(b) Sect. 3 authorizes the distress, under warrant of two or more justices,(c) on the goods of persons who shall refuse or neglect to pay after ten days' notice of an order of the said justices, made under sects. 1 and 2. Sect. 1 enacts that all persons "shall henceforth well and truly set out and pay all and singular the tithes, commonly called small tithes, and compositions and agreements for the same, with all offerings, oblations, and obventions, to the several rectors, vicars, and other persons, to whom they are or shall be due, in their several parishes," &c., "according to the rights, customs, and prescriptions commonly used within the said parishes respectively; and if any person or persons shall hereafter subtract or withdraw, or any ways fail in the true payment of such small tithes, offerings, oblations, obventions, or compositions as aforesaid," for twenty days after demand, complaint may be made to two or more justices of the county, &c., "neither of which justices of peace is to be patron of the church or chapel whence the said tithes do or shall arise, nor any ways interested in such tithes, offerings, oblations, obventions, or compositions aforesaid." Sect. 2 enacts that, when the complaint is made to the justices, they shall summon the party complained of, and, on appearance, or default after summons, "proceed to hear and determine the said complaint, and upon the proofs, evidences, and *testimonies, [*8 produced before them, shall, in writing under their hands and seals, adjudge the case, and give such reasonable allowance and compensation for such tithes, oblations, and compositions so subtracted or withheld, as they shall judge to be just and reasonable, and also such costs and charges, not exceeding 10s., as upon the merits of the cause shall appear just."

First: mortuaries do not fall within the words of this statute. They are neither small tithes, nor compositions or agreements for the same, nor offerings, oblations, or obventions. In 3 Burn's Ecc. L. 36 (9th ed.), tit. *Offerings*, it is said, that "Offerings, oblations, and obventions, are

(a) April 27, 1849. Before PATTERSON, COLERIDGE, and ELLIS, Js.

(b) Continued by stat. 10 & 11 W. 3, c. 15, and made perpetual by stat. 3 & 4 Ann. c. 18, s. 1.

(c) A single justice may receive the complaint and summon, by stat. 53 G. 3, c. 127, s. 4, and by the general enactment of stat. 11 & 12 Vict. c. 43, s. 29, which also enables any one justice to issue the warrant of distress.

one and the same thing: though obvention is the largest word." It is true that Burn comprehends, under these, "the customary payment for marriages, christenings, churchings, and burials:" but a mortuary is due whether the party be buried in the churchyard or not; and, accordingly, Burn has a distinct article under the title *Mortuary*; vol. 2, p. 562 a: and he there adopts the distinction, that the mortuary "was a right settled on the church upon the decease of a member of it; and a corse present was a voluntary oblation usually made at funerals." The distinction may be collected from Jacob's Law Dictionary, where there are distinct titles of *mortuary*, *oblations*, *obventions*, and *offerings*. Blackstone, in 2 Comm. 425, defines mortuaries as "a sort of ecclesiastical heriots." In 4 stat. 13 Ed. 1, c. 1 (*Circumspectè agatis*), "mortuaries" are spoken of in sect. 5 after "oblations or tithes due and accustomed" have been mentioned. Stat. 21 H. 8, c. 6, limits the amount to be taken for mortuaries; and here they are spoken of without *9] any mention of offerings, oblations, or obventions. On the *other hand, stat. 2 & 3 Ed. 6, c. 13, s. 10, speaks of offerings, without any mention of mortuaries: and that offerings there do not include mortuaries appears from the enactment, in that section, that the offerings shall be paid yearly, at such four offering days as had been accustomed for the last four years, or else at Easter; a provision manifestly inapplicable to mortuaries. Neither therefore can mortuaries be included in the word "obventions," mentioned in sect. 13 of the same statute. Yet obventions is the most comprehensive word in stat. 7 & 8 W. 3, c. 6. [COLERIDGE, J.—According to your present argument, stat. 2 & 3 Ed. 6, c. 13, would not apply to payments for the churching of women. What description would you give of a mortuary? It is said to have been originally a voluntary offering, which had become customary as a sort of composition.] In 1 Eagle on Tithes, 418, it is said: "Mortuaries, which are indisputably due only by special custom, are said to have been given *pro recompensatione subtractionis decimarum personalium, necnon et oblationum*, and for this reason they have been sometimes classed under the head of personal tithes, and offerings." He refers to 2 Inst. 491, (a) which contains nothing illustrating the question now before the Court. The explanation appears to be merely conjectural; and the author does not notice any statutable proceeding for the recovery of mortuaries, except under the statute of *Circumspectè agatis*, and stat. 21 H. 8, c. 6; though he speaks earlier (p. 417) of the offerings, oblations, and obventions recoverable under stat. 7 & *10] 8 W. 3, c. 6. Again, mortuaries cannot have been *contemplated by a statute giving summary jurisdiction, to be exercised by justices ten days after complaint and order, if payment has not been made within twenty days after demand; for, to ascertain the amount payable, it might be necessary to inquire into all the assets and liabili-

(a) Also to Godolph. Report. 423 (2d ed.), c. 32.

ties of the deceased, which would in most cases be impossible within the time. Further, the remedy by sect. 3 is against the person who shall refuse or neglect to pay: the legislature here cannot have had in view the estate of a deceased person.

Next, assuming that mortuaries are not within stat. 7 & 8 W. 3, c. 6, the magistrates had no jurisdiction. On the other side, reliance will be placed on the class of cases including *Basten v. Carew*, 3 B. & C. 649 (E. C. L. R. vol. 10), *Brittain v. Kinnaid*, 1 Br. & B. 432 (E. C. L. R. vol. 5), and *Mould v. Williams*, 5 Q. B. 469 (E. C. L. R. vol. 48): and it will be said that the order of the magistrates conclusively shows the facts proved to be within their jurisdiction, and that no other evidence can be admitted to show what those facts were. That argument might prevail, if the order confined itself to the words of the statute. But it directs payment, not only of oblations and obventions, but of "other customary dues and payments," an expression which might include, not only mortuaries, but customary copyhold fines. The order, therefore, if looked at alone, is bad for uncertainty: it should at any rate have shown how much was due under each of the heads: and, if more than the order is looked at, the particular objection is let in. But, further, the facts may be looked at for the purpose of showing whether, upon the complaint made, the justices had *power to commence the inquiry at-all: (a) and, if the first objection be [*11 good, they had no such power.

Again, the information ought to have shown (as the order does show) that the justices to whom the complaint was preferred were not interested in the offerings. A conviction under a statute is bad which does not negative the exceptions in the statute; *Rex v. Jukes*, 8 T. R. 542. [COLERIDGE, J.—How is the party making the complaint to know whether the magistrate is interested?] The magistrate must know; and, if he is interested, he ought not to act. [COLERIDGE, J.—Your objection applies here to the complaint only.] Sect. 1 requires the complaint to be made to a justice who is not interested: if a complaint were made to a justice who was so, the objection would not be cured by his parting with his interest before the hearing. There has been no such complaint as the statute requires. And, further, the warrant is incorrect, as it orders distress to be made of the goods and chattels of John Watson, deceased; whereas, by stat. 7 & 8 W. 3, c. 6, s. 3, the distress is to be on the goods and chattels of the party refusing to pay. [COLERIDGE, J.—The words here must be taken to mean the goods in the possession of the executors, which were of the deceased.]

Edward James, contrà.—Mortuaries are within the words "offerings, oblations, and obventions," in stat. 7 & 8 W. 3, c. 6, s. 1. All the definitions in the books bring them under one or other of these terms. The

(a) See *Regina v. Bolton*, 1 Q. B. 66 (E. C. L. R. vol. 41).

*12] explanation in 2 Inst. 491, is: "*Mortuarie*. Or, a corse present. Mortuarium is a gift left by a man at his *death, pro recompensatione subtractionis decimarum personalium, et oblationum." That implies that the mortuary itself is in the nature of an oblation, or offering. [COLERIDGE, J.—Do you understand "left" to mean bequeathed?] It might be a deathbed gift. But it is said to have been considered as a kind of ecclesiastical heriot. [COLERIDGE, J.—That is noticed in Stephens's Treatise of the Laws relating to the Clergy, a very careful work, where (vol. i. p. 809) Bracton is cited on this point.(a) The second best beast or chattel was reserved to the Church by custom in some places; and this caused mortuaries to be looked upon in the light of heriots.] In Wats. Clerg. Law, 582, c. 52, mention is made of "mortuaries and offerings, called also oblations and obventions." They seem to be treated as oblations in the notes to 1 Gibs. Cod. 709 (2d ed. Tit. xxx. c. 12): and, in 2 Burn's Ecc. Law, 562, tit. *Mortuary*, s. 1, it is said that "Mortuary seems to have been originally an oblation made at the time of a person's death." Mortuaries are indeed mentioned separately from "oblations" in the statute *Circumspectè agatis*, 4 stat. 13 Ed. 1, c. 1; but that Lord COKE deemed them to fall under that description may be inferred from his comment on the statute in 2 Inst.: "Oblationes in the canon law are thus defined: 'Oblationes dicuntur quæcunque a piis fidelibusque Christianis offeruntur Deo et ecclesiæ, sive res solidæ, sive mobiles:'" 2 Inst. 489. And in 1 Gibs. Cod. 704, note *g* (Tit. xxx. c. 10), it is said: "What may be properly called oblations, *13] are those which Lyndwood describes: *Accedentes ad solennia *nubentium, purificationes mulierum, mortuorum exequias, et alias solennitates divinas et populares, solebant aliquid certum offerre.*" "From which customary offerings, the fees or duties now payable on these occasions did probably spring, and may be thought a kind of composition for them:" and it is added that by the common law, as well as by statutes, among which is *Circumspectè agatis*, these profits are recoverable in the Spiritual Court. In 3 Burn's Eccl. Law, 36, tit. *Offerings*, it is said that "Offerings, oblations, and obventions, are one and the same thing: though obvention is the largest word. And under these are comprehended, not only" Easter offerings, "but also the customary payment for marriages, christenings, churchings, and burials." [COLERIDGE, J.—According to the judgment in *Andrews v. Cawthorne*, Willes, 536, 537, note (a), a burial fee is different from a mortuary.] In Com. Dig. *Prohibition* (G. 11), it is said, that "the Court Christian shall hold plea for oblations, obventions, mortuaries, pensions:" and that "oblations comprehend the customary payments of every communicant, or for marriages, christenings, churchings, or burials." In 2 Inst. 659, "offerings or oblations" are mentioned indiscriminately as "the profits of the church," "free or voluntary, and consuet; or by

(a) Bracton, fol. 60 a. Lib. 2, c. 26, § 1.

custom, as here" (by stat. 2 & 3 Ed. 6, c. 13, s. 10), "it appeareth." It is true that, by the clause last referred to, the payments are to be made on stated "offering-days," whereas mortuaries are of uncertain occurrence: but, if this were a reason for holding mortuaries not to be included in the clause or comment, the same argument would exclude marriage fees. And sect. 13 of that *act gives a process in the Ecclesiastical Court, "if any person do subtract or withdraw any [*14 manner of tithes, obventions, profits, commodities, or other duties before mentioned, or any part of them, contrary to the true meaning of this act, or of any other act heretofore made." Again, difficulties arise in construing the statutes, if mortuaries are not included under the words "oblations and obventions;" for, if that be so, disputes concerning them are not withdrawn from the jurisdiction of the See of Rome by the act "For the restraint of appeals," 24 H. 8, c. 12, sects. 2, 4. [ERLE, J.—That seems to be provided for afterwards by stat. 1 Eliz. c. 1, sect. 16.] Again, according to the same argument, mortuaries, not being expressly mentioned, would not be included in stat. 27 H. 8, c. 20, s. 1, which enacts that every subject of the King's realm, &c., "according to the ecclesiastical laws and ordinances of his Church of England, and after the laudable usages and customs of the parish or other place where he dwelleth or occupieth, shall yield and pay his tithes, offerings, and other duties of holy Church:" though the payment of mortuaries had been expressly regulated, a few years before, by a statute (21 H. 8, c. 6) framed entirely for that purpose. But in Wats. Clerg. Law, 590, 591, c. 53, stat. 27 H. 8, c. 20, is clearly treated as applying to mortuaries. [ERLE, J.—Mortuaries, there, may be included under the words "other duties." The argument for the plaintiff is only that they are not "offerings, oblations," or "obventions."] Stat. 32 H. 8, c. 7, is "for the true payment of tithes and offerings." The mischief recited is the withholding of tithes of corn, &c., "and other sort of tithes and oblations commonly due," &c. *Sect. 2 [*15 ordains that all persons shall pay "all and singular tithes and offerings aforesaid," and gives jurisdiction to the ordinary in case of refusal: and sect. 4 provides a remedy by proceeding before justices, if persons do not pay their "tithes or duties" after definitive sentence. [PATERSON, J.—There is a great deal of variation in the language of the statute: sect. 7 speaks of "tithes, oblations, or other ecclesiastical or spiritual profit."] The result of the whole is, that offerings, duties, and oblations are considered as one and the same thing. And in Co. Lit. 159 a, the statute is considered as extending to every "ecclesiastical or spiritual profit," and giving a remedy for the withholding of tithes or "offerings" generally. It cannot justly be contended that, because an earlier statute speaks of mortuaries specifically, a later one, using language that may include them, does not do so, merely because the specific mention is not repeated. It is true, that stat. 21 H. 8, c.

6, speaks of ecclesiastical persons only as interested in mortuaries; but there is no reason that mortuaries may not have been annexed to religious houses before the dissolution of the Monasteries,^(a) and have come afterwards into lay hands: the remedy under stat. 32 H. 8, c. 7, s. 2, is given to "lay" as well as "ecclesiastical" persons; and it is observed in Co. Lit. 159 a, that "tithes and other ecclesiastical duties, that came to the Crown" by the statutes of Henry 8 and Ed. 6, there enumerated, are, by those statutes, and stats. 32 H. 8, c. 7, and 1 & 2 Ph. & M. c. 8,^(b) "in the hands of laymen temporal inheritances" and "assets." In *Marke v. Gilbert*, 1 Sid. 263, S. C. 1 Keb. 919, it ^{*16]} was not questioned that a mortuary might be payable to an impropiator. It will be found that all ecclesiastical dues are either tithes or something included under the general term "offerings." In Com. Dig. *Dismes* (B 1), after treating of tithes, it is said: "Other ecclesiastical revenues were oblations, or obventions, pensions, and mortuaries." Mortuaries there are spoken of as if distinct from oblations and obventions; but so are pensions as distinct from tithes: yet "pensions are certain sums of money paid to clergymen in lieu of tithes:" 3 Burn's Eccl. Law, 106, in verb. "*Pension*."

The supposed inconvenience of raising questions of this kind before justices of the peace cannot overcome the direct construction of a statute. [PATTESON, J.—It may be a ground for rejecting the construction which would raise the inconvenience, if there be a doubt. ERLE, J.—The inconvenience, on most estates, would be very trifling: there would only be a question of *plenè administravit* as to a very small sum.] And the proof, to subject a party to the jurisdiction, would lie on the complainants. [PATTESON, J.—It struck me as odd that justices should, under stat. 7 & 8 W. 3, c. 6, have power to try a custom: it would seem, from sect. 8, that they may try questions of prescription, composition, modus, agreement, or title relied upon as exempting from tithe, if security be not given for payment of costs on a trial at law.]

The order itself here is conclusive as to the jurisdiction. By the proceedings it appears that a charge has been well laid before the justices, which charge, on its face, was within their jurisdiction, so that they were bound to inquire into it. On inquiry regularly made, they decide that ^{*17]} such a charge is proved; namely, that ^{*}the parties complained of have withheld oblations and obventions which were due from them. Then, on the principles laid down in *Regina v. Bolton*, 1 Q. B. 66 (E. C. L. R. vol. 41), this Court cannot look into the grounds of the decision for the purpose of ascertaining that the magistrates had not jurisdiction; that is, that the oblations were mortuaries, a thing to which the jurisdiction is said not to extend. *Brittain v. Kinnaid*, 1 Br. & B. 432 (E. C. L. R. vol. 5), *Cave v. Mountain*, 1 Man. & G. 257 (E. C. L. R. vol. 39),

(a) James here cited *The Duke of Portland v. Bingham*, 1 Hag. Cons. Ca. 157, 163.

(b) Sect. 36.

and *Mould v. Williams*, 5 Q. B. 469 (E. C. L. R. vol. 48), support the same argument. If the decision here was wrong, the party should have appealed under sect. 7 of stat. 7 & 8 W. 3, c. 6. But, supposing that this Court could look into the proceedings, it would be found that, in fact, nothing was inquired into but non-payment of a mortuary, as to which the justices had jurisdiction.

The objection of uncertainty in the form of the order is groundless. If the magistrates had, by stat. 7 & 8 W. 3, c. 6, jurisdiction with respect to oblations and obventions, the addition of the words "and other customary dues and payments" cannot prejudice. The objection now suggested should, if valid, have prevailed in *Rex v. Owen*, 4 Burr. 2095. At any rate the words "other dues" here must be taken to mean others ejusdem generis. That would have been the construction of the statute, if its words had been "oblations, obventions, and other customary dues and payments;" *Sandiman v. Breach*, 7 B. & C. 96 (E. C. L. R. vol. 14). [ERLE, J.—"Other" always implies something additional; and, if any part of the first 10s. awarded in the order was for anything but oblations or obventions, the jurisdiction was exceeded.]

*The objection, that it was not shown on the face of the information that the magistrates had no interest, was unsupported by [*18 any authority. (*Addison* admitted that he had found none; and this point was not further discussed.)

Addison, in reply.—In the passage cited on the other side from *Wats. Clerg. L. 582*, it is "offerings," not mortuaries, that are "called also oblations," &c. In 4 stat. 13 Ed. 1, c. 1, mortuaries and oblations are ranked under distinct heads; and so they are in Lord Coke's comment, 2 Inst. 489, 491. As to the difficulty suggested with respect to stat. 24 H. 8, c. 12, if mortuaries were not comprehended in the description of causes which, by sect. 2, were made determinable exclusively in the King's courts, it may be supposed that the omission was contemplated and provided for in stat. 1 Eliz. c. 1. Assuming that, on reference to facts, it would appear that the justices acted within their jurisdiction, as is suggested on the other side, yet, if the order was on the face of it bad, they would not be justified; *Lindsay v. Leigh*, 11 Q. B. 455 (E. C. L. R. vol. 63). The finding of the justices here does not bring their proceeding within the principle of *Brittain v. Kinnaird* and similar cases. In *Mould v. Williams*, for instance, the justice had in effect found that the place in question was a highway: here the order contains no finding that the subject of claim was a mortuary. It is as if, in *Brittain v. Kinnaird*, the conviction had stated that the plaintiff had in his possession, not a "boat" but a vessel. In such a case it is not controverting a fact *found to give proof that the thing is not that in respect of which the statute gives jurisdiction. Either evidence [*19 was admissible here, or the order is bad on the face of it.

Cur. adv. vult.

PATTESON, J., now delivered the judgment of the Court.

The principal question in this case is whether "mortuaries" are within the jurisdiction of justices of the peace under the statute 7 & 8 W. 3, c. 6, s. 1.

The preamble of the act mentions only "small tithes:" the enacting part uses the words "small tithes, and compositions and agreements for the same, with all offerings, oblations and obventions," and, in case of their subtraction, gives a summary remedy before two justices. An appeal is given to the sessions, and the writ of certiorari is taken away "unless the *title* of such tithes, oblations, or obventions, shall be in question." It is also provided, by sect. 8, that, "where any person" "complained of for subtracting or withholding any small tithes, or other *duties aforesaid*, shall" "insist upon any prescription, composition, or modus decimandi, agreement, or title, whereby he or she is or ought to be freed from payment of the said tithes, or other dues in question," on security given the justices shall forbear, and the party complaining may sue in any other Court where he might have sued before the passing of the act.

The word "mortuary" is not used throughout the act: but the defendants contend that it is comprehended in the words "offerings, oblations and obventions."

*20] *The origin of mortuaries is by no means clear: but they seem to have been in very early times voluntary, as a sort of offering to the church for any possible omissions of which the deceased person may have been guilty in respect to the dues of the church. Afterwards, the second best beast of the deceased seems to have been claimed as a mortuary of right. At any rate, so early as the reign of Edward I., the right to a mortuary had become matter of custom.

The statute *Circumspectè agatis*, 4 stat. 13 Ed. 1, has these words: "Item si Rector petat versus parochianos, *oblaciones*, et decimas debitas et consuetas, vel si Rector agat contra Rectorem de decimis majoribus vel minoribus, dummodo non petatur quarta pars valoris. Item si Rector petat *mortuarium in partibus ubi mortuarium dari consueverit*."(a) From which words it appears that a mortuary was at that time matter of custom; and also that it was not considered as included in the word "oblatio," which is used in a distinct clause of the statute.

The same expressions are used in the statute, *Articuli cleri*, 1 stat. 9 Ed. 2, c. 1. "Imprimis Laici impetrant prohibitiones in genere super decimis, obventionibus, oblationibus, mortuariis,"(a) etc.

Then comes the statute 21 H. 8, c. 6, which is confined to mortuaries only, and enacts, sect. 3, "That no mortuary shall be given, asked, or demanded from henceforth of any manner person, but only in such place where heretofore mortuaries have been used to be paid and given, and in those places none otherwise but after the rate and form hereafter

(a) See the folio Statutes of the Realm (1810), Vol. I. pp. 101, 171.

mentioned:" *and then it limits the amount; and the highest is 10s. "for any person dying or dead, having at the time of his death of the value in movable goods of 40l. or above, to any sum whatsoever it be, clearly above his debts paid:" and by sect. 2 it is plain that the mortuary was to be sued for in the Ecclesiastical Court. [*21

In the same reign acts were passed, in 27 H. 8, c. 20, for the better recovery of "tithes, offerings, and other duties," and 32 H. 8, c. 7, for "tithes," "oblations," and "offerings:" but in neither of them is the word "mortuary" used. Then, by stat. 2 & 3 Ed. 6, c. 13, further provisions are made as to tithes, and by sect. 10 it is provided that all persons shall pay their *offerings* yearly at such four offering days as have been accustomed: a provision manifestly inapplicable to mortuaries. And, by sect. 13, "if any person do subtract" "any manner of tithes, obventions, profits, commodities, or other duties before mentioned," "contrary to the true meaning of this act, or of any other act heretofore made," he shall be sued in the Ecclesiastical Court. The word "mortuary" is not used in this latter act.

Neither is that word used in the statute 24 H. 8, c. 12, "for the restraint of appeals." In the second section, prohibiting appeals to Rome, the words are, "all causes testamentary, causes of matrimony and divorces, rights of tithes, oblations, and obventions (the knowledge whereof by the goodness of princes of this realm, and by the laws and customs of the same, appertaineth to the spiritual jurisdiction of this realm)."

Yet it seems most probable that causes of subtraction of mortuaries, which certainly appertained to the spiritual jurisdiction of this realm, were intended to *be included in the prohibition of appeals to Rome by the words "causes" of "obventions;" although it is true that, in the following year, in the statute 25 H. 8, c. 19, s. 3, more general words are used respecting such appeals, and so far tend to weaken the probability of the supposed intention. We think it highly improbable that the legislature, having regulated the payment for mortuaries, and reduced the amount to such very small sums, in the 21st year of King Henry the Eighth, recognising that those sums should be recovered in the Ecclesiastical Courts, should have purposely omitted them in the subsequent statutes in the 24th and 27th and 32d years of the same reign, and in the 2d and 3d of Edward VI., and are therefore much disposed to think that they are included under the word "obventions" used in those statutes. [*22

If so, they would be equally included under the same word in the statute in question, 7 & 8 W. 3, c. 6, unless there be anything in that act plainly repugnant to such a construction.

Now the argument against such construction, derived from the language of the act, is, that no provision is made for the case of a dispute respecting the existence of a custom to pay a mortuary. The eighth

section, above stated, does not extend to such a case; for it manifestly applies to tithes and other ecclesiastical duties which are due of common right, and from which an exemption is claimed by prescription, &c. Nor does the seventh section seem to extend to such a case; for that applies only when the *title* of such tithes, oblations, or obventions shall be in question, not when the existence of such obvention, which, in the case of a mortuary, must be by custom, is in question.

*23] *This is a formidable objection; for we can hardly think that the legislature intended to deprive the party from whom a mortuary is claimed, small as the amount is, of all opportunity of submitting the existence of the custom to a jury, which opportunity is in effect preserved in the case of small tithes and other ecclesiastical dues, though amounting only to 40s., that being the amount to which the provisions of the act are limited. There is also weight in the argument that the statute 21 H. 8, c. 6, regulates the amount of the mortuary according to the value of the deceased's movable goods "clearly above his debts paid;" and it seems difficult to suppose that an inquiry into the assets and debts of the deceased was intended by the statute 7 & 8 W. 3 to be conducted before two justices.

Upon the whole, therefore, we are of opinion that a mortuary is not within the act of W. 3, and that the defendants had no jurisdiction.

This opinion, however, is founded on the assumption that evidence was properly admitted to show that the demand was for a mortuary; whereas it was contended for the defendants that the order or conviction of the justices, not stating anything about a mortuary, but adjudicating only that 10s. were due from the plaintiffs, as executors, for "the said oblations, obventions, and other customary dues and payments," was conclusive on the plaintiffs, within the authority of the case of *Brittain v. Kinnaid*, 1 Br. & B. 432 (E. C. L. R. vol. 5). No doubt, if the justices had found certain facts which were necessary to *24] and would give them jurisdiction, the truth of those facts *could not be disputed in this action; but here no specific facts are found.

The plaintiffs also meet this objection by contending that the order is bad on the face of it, on account of the words "and other customary dues and payments," which words not being in the act 7 & 8 W. 3, the order itself shows that the justices have exceeded their jurisdiction. On the other side, the case of *Rex v. Owen*, 4 Burr. 2095, was relied on, where the words "tithes and other ecclesiastical rights" were used in the Ecclesiastical Court; and it was held that the jurisdiction sufficiently appeared, though the statute on which it was founded had not the words "other ecclesiastical rights." That, however, was not a sentence or conviction, but a libel only; and the proceeding in the Court of King's Bench was in respect of a contempt of the Ecclesiastical Court in not appearing: that Court had jurisdiction in respect to tithes;

and, if the party had appeared, non constat that any proceeding would have been had for any other matters: but here the order or conviction is in respect of all the matters stated in it, and the justices had no jurisdiction in respect of part, viz. "other customary dues and payments," unless they were such as were properly described as oblations or obventions. This case, therefore, is more within the authority of *Branwell v. Penneck*, 7 B. & C. 536 (E. C. L. R. vol. 14); and, if the evidence of the complaint being for a mortuary be excluded, the verdict for the plaintiffs would be right, on account of the badness of the order on the face of it. If, on the other hand, it be admitted, then the verdict is right on the ground of a mortuary not being within the act.

*We think that, on account of the generality of the words of the order or conviction, the evidence was properly admitted, and the real question intended to be tried was properly raised. [*25

Judgment for the plaintiffs.

The QUEEN v. The GREAT NORTHERN Railway Company.

July 5.

A compensation jury, of the city of L., awarded compensation to a landowner, under stat. 8 & 9 Vict. c. 20, s. 6, in respect of the works of a railway Company, by which he alleged that his land was injuriously affected.

The land was divided from the railway works by a river. The land was in the city; the works were not. The mode in which the works injuriously affected the land was, that they obstructed the access to a ferry over the river and appurtenant to the land in question. Held:

That, as the land lay in the city, the inquisition was rightly taken there.

That the ferry might pass with the land, under a conveyance of the land with "all profits and commodities belonging to the same;" and that, where, as far as living memory went, the land and ferry had always been enjoyed by the same person, and there was no evidence to show that they ever had been the subjects of separate conveyances, a compensation jury were justified in concluding that the ferry did pass with the land under the above words. At all events, that there was no such want of jurisdiction as to call for a certiorari or prohibition.

SIR J. JERVIS, Attorney-General, in last Easter term, obtained a rule to show cause why a certiorari should not issue to remove an inquisition taken before the sheriff of the city of Lincoln and county of the same city for the purpose of assessing the compensation to be paid by The Great Northern Railway Company to Edward Cooling, for damage sustained by him as regarded his lands, hereditaments, &c.; and the judgment thereon; or why a prohibition should not issue to restrain Cooling from taking further proceedings upon the said inquisition and judgment.

It appeared from the affidavits that the Company, in 1848, had constructed a portion of their line of railway along the west bank of the cut or river called the Fosdyke, the centre of which was stated to be the boundary between the parish of Skellingthorpe on the *said [*26 west side, and the parish of St. Mary le Wigford on the east side

of the cut. Shortly afterwards the Company received from Cooling, as "a party entitled to compensation in respect of an interest in lands situate in the parish of St. Mary le Wigford in the city of Lincoln, which lands have been injuriously affected by the execution of the works of your undertaking," notice of his desire to have the compensation due to him in respect of such interest "assessed by a jury of the city of Lincoln." The notice described that the manner in which his lands had been injuriously affected was "by the disturbance of and cutting off the communication with an ancient ferry attached and belonging to and held with the lands in question." The Company issued a warrant accordingly to the sheriff of the city, under which an inquisition was taken for assessing the required compensation. Both parties attended the inquisition; and, it being admitted that the west side of the cut, where the works causing the obstruction to the ferry were situate, was not in the city of Lincoln, it was objected, on behalf of the Company, that the sheriff of the city had no jurisdiction to take the inquisition. The ferry in question was an ancient ferry, and, as far back as living memory extended, had always been attached to a house (recently used as a public-house) and premises on the east side of, and adjoining to, the cut, within the city. This house and premises had been the property of the Corporation of the city in fee simple; and the occupier of the house had always kept a ferry boat, and taken toll from passengers. No evidence was given to show when or in what manner the Corporation had become *27] possessed of the ferry or premises. Cooling deduced title from *the Corporation by proof of a lease from them to one Robert Cooling in 1827. This lease did not expressly mention the ferry; but it demised the premises, with "all profits and commodities belonging to the same." He also put in evidence a conveyance of the fee by the Corporation to one John Hill in 1835; and a similar conveyance from John Hill to himself in 1841. The conveyances referred to the lease, and purported to convey everything whatsoever which had been thereby demised. It was further objected that Cooling had shown no title to the ferry. The sheriff held that the inquisition was properly taken in the city; and he left the case to the jury, who awarded 380*l.* as compensation; and for that sum judgment was given.

In last term, (a)

Crowder and *Tomlinson* showed cause.—Cooling was in possession of the ferry which had been "injuriously affected" by the works of the Company within the meaning of stat. 8 & 9 Vict. c. 20, s. 6. Compensation in such cases is not limited to injuries done by taking or entering upon the property itself of the landowner; *Regina v. The Eastern Counties Railway Company*, 2 Q. B. 347 (E. C. L. R. vol. 42); where it was held that a landowner was entitled to compensation on

(a) June 28. Before Lord DENMAN, C. J., PATTESON and ERLE, Js. COLERIDGE was sitting at Nisi Prius in London.

account of the lowering of a road so as to impede the access to his land. The ferry passed to Cooling under the words "profits and commodities." It may be objected that the affidavits do not show that the landing place on either side belonged to him. This is unnecessary. The owner of *a ferry must have a right to use the land on both sides of the water for the purpose of embarking and disembarking [*28 his passengers; but it is not essential that he should have any property in the soil on either side; *Peter v. Kendal*, 6 B. & C. 703 (E. C. L. R. vol. 13). Cooling's possession would have enabled him to maintain an action on the case for disturbance of his ferry; *Trotter v. Harris*, 2 Y. & J. 285.†

Secondly: The inquisition was rightly taken in the city of Lincoln, where the land to which the ferry was appurtenant, and where part of the cut itself was also situate. Where a trench made in one county damaged the plaintiff's land in another county, the action was held to be rightly brought in the latter county, although it was required by statute that any such action should be brought in the county where the cause of action arose; *Sutton v. Clarke*, 6 Taunt. 29 (E. C. L. R. vol. 1). Besides, the Company directed its own warrant for the inquisition to the sheriff of the city, and is, therefore, estopped from objecting to the venue.

Sir *J. Jervis*, Attorney-General, and *Karslake*, contra.—The Company's warrant necessarily followed the terms of Cooling's own notice. The evidence failed to show either that this was a private ferry or that it belonged to Cooling; the real complaint is that by the obstruction of a public way in the neighbourhood the resort to his public-house has been impeded: and this does not entitle him to compensation; *Rex v. The London Dock Company*, 5 A. & E. 163 (E. C. L. R. vol. 31).

Cur. adv. vult.

*PATTESON, J., now delivered the judgment of the Court.

Cooling claims compensation from The Great Northern Railway [*29 Company in respect of an injury to land held by him in fee in the city of Lincoln. The injury, if any, is occasioned by the works of the Company in the county of Lincoln, on the other side of the Fossdyke, by cutting off communication on the Lincolnshire side with a ferry said to belong or be appurtenant to the land of Cooling. Objection is made to the jurisdiction of a city jury; but it appears that the boundary of the county and city is in the midst of the Fossdyke, and the land injured lies wholly in the city. The jury of the city were therefore competent to try the question; *Sutton v. Clarke*.

Objection is also made that this case is within the principle of the London Dock Company's case,^(a) where it was held that the destruction of houses and public roads in the neighbourhood of a public-house, by which the custom of the house was diminished, was not the subject of

(a) *Rex v. The London Dock Company*, 5 A. & E. 163 (E. C. L. R. vol. 31).

compensation. But the present case is quite distinguishable. Here the ferry is a private right; and, if it be attached to the land of Cooling, the value of that land is seriously affected. The question is, whether it be so attached? Cooling is not the owner of the water, nor of the landing places, as it should seem, on either side; certainly not on the Lincolnshire side. But it is not essential to a ferry that the owner of it should have the land on either side, if he has the right of *30] using that land for the purpose of the ferry; *Peter v. Kendal: and the evidence of user here for many years is abundant to show such right.

The only difficulty is the title to the ferry. The land, it appears, belonged to the Corporation of Lincoln till the year 1841, when it was sold to a Mr. Hill, a trustee of the Cooling family, who had a lease of it from the Corporation; and by Mr. Hill it was sold to Cooling. Neither the lease nor the conveyance expressly mention the ferry, but lease and convey the land with its "*profits and commodities.*" There is no evidence as to the original grant of the ferry by the Crown, nor as to any conveyance of it by name. The lessees of the land have always, as far as living memory goes, kept a boat and taken toll at the ferry; and it is plain that they must have done so by the permission of the Corporation, though no express lease of the ferry appears ever to have been made. It is left quite uncertain whether the grant was originally to the owner of the land, and the Corporation had the ferry as such owners, or whether it was to the Corporation as such, independent of their ownership: probably the latter, because the landing place is not shown to belong to the Corporation or Cooling, and, if the grant had been to the owner of the land, it would probably have been to him who owned the landing places. On the other hand, as the Corporation have never separated the land and the ferry, it may fairly be inferred that they were connected by the original grant. If they had at any time been separated, and if the ferry had been conveyed to Cooling by the Corporation separately from the land, he clearly would not have been entitled to compensation in respect of any injury to his *31] land, *for which only he claimed it, and for which a jury was summoned and gave their verdict in his favour. But there has been no separate conveyance; and the only question therefore is, whether the ferry has passed to Cooling by the conveyance of the land with its "*profits and commodities.*" Under all the circumstances we think that the jury were warranted in coming to the conclusion that it did; and at all events that there is no such want of jurisdiction as to call upon us to grant a writ of certiorari or of prohibition in this case.

Rule discharged.(a)

IN THE EXCHEQUER CHAMBER.

OLIVER WATERLOO KING *v.* The QUEEN, in Error.

By the Court of Exchequer Chamber:

1. An affidavit to hold to bail, under stat. 1 & 2 Vict. c. 110, s. 3, may be sworn before a writ of summons has been taken out; and therefore, in an indictment for perjury in such an affidavit, it is not necessary to show that an action had commenced before the affidavit was sworn.
2. Where an indictment contains several counts, and a defendant is convicted on each, a judgment, that the defendant, "for the offence charged upon him in and by each and every count of the indictment aforesaid, be imprisoned in," &c., "for the space of eight calendar months now next ensuing," is correct, and means that the defendant shall be imprisoned for the same eight months upon the charge in each count.
3. After a verdict of Guilty, on an indictment, and prayer of judgment, the record stated that it appeared to the Court "that the verdict was unduly given," and the Court "vacated and made void" the verdict, and all other process against the first jury, and ordered that a new jury should come, because the coroner and defendant had put themselves on the last-mentioned jury. A second verdict of Guilty was found; and judgment passed thereon. Such entry is sufficient on writ of error, though no reason be assigned on the record for holding the first verdict to have been unduly given.

THE defendant was indicted in the Central Criminal Court. The record in this Court stated that "it was presented as follows; that is to say: Central Criminal Court, to wit: The jurors," &c., "present *that, before the commission of the offence in the first count of this indictment mentioned, a certain action of debt had been com- [*32 menced in the Court of Queen's Bench at Westminster, by writ of summons duly issued," &c., in which action defendant was plaintiff and George Felthouse defendant: "And the jurors aforesaid, upon their oath aforesaid, do further present that," &c.: the first count then charged that the present defendant, for the purpose of having Felthouse held to bail, and obtaining a *capias* against him, swore to the truth of an affidavit: and perjury was assigned upon this.

The second count charged that defendant, wilfully, &c., intending unjustly to aggrieve Felthouse, &c., "and also unjustly and maliciously to cause him," "to be arrested for the sum of 46*l.* by virtue of a" "*capias*, to be sued out and prosecuted at the suit of him the said O. W. King, afterwards," to wit, on, &c., "at the Liberty of the Rolls aforesaid, in the county aforesaid, and within the jurisdiction of the said Court, came in his proper person before Sir CRESSWELL CRESSWELL, Knight," &c., "and then and there produced a certain affidavit in writing of him, the said O. W. K., and then and there, before the said Sir C. C., was in due form of law sworn, and took his corporal oath," &c., "concerning the truth of the matters contained in the said affidavit in this count mentioned, he, the said Sir C. C." (averment of the Judge's competency to administer the oath); "and that the said O. W. K., being so sworn," &c., "then and there, upon his oath aforesaid before the said Sir C. C." (averment of competency), "falsely, corruptly, knowingly," &c., "in and

*33] by his said affidavit in writing in this count mentioned, *did depose and swear (amongst other things) in substance and to the effect following, that is to say: that the above-named defendant (meaning thereby the said G. Felthouse) then was justly and truly indebted to the then deponent (meaning thereby himself, the said O. W. K.), in the sum of 46*l.* for goods sold and delivered by the then deponent (thereby meaning himself the said O. W. K.) to the said defendant (meaning thereby the said G. F.) at his request, and for money lent by the then deponent (meaning himself the said O. W. K.) to the said defendant (meaning thereby the said G. F.) at his request; whereas, in truth and in fact," &c.: averment that Felthouse was not indebted to King in 46*l.*, but in a sum below 20*l.*, to wit, 10*l.* only, "as he, the said O. W. K., at the time he so swore and made affidavit as in this count aforesaid, well knew; and so the jurors," &c. (finding of perjury).

The record then set out the removal into this Court by certiorari; a plea of Not guilty in this Court; joinder by Charles Frederick Robinson, Esquire, Coroner, &c.; and jury process, continued to the trial at Westminster; the return of the postea, with the finding that the defendant "is guilty of the premises in the indictment within specified and charged upon him, in manner and form as in and by the said indictment is within alleged against him. And hereupon the said C. F. Robinson, who prosecuteth," &c., "prayeth the judgment of the said Court here against the said O. W. K. upon the verdict aforesaid so given against him as aforesaid. Whereupon, all and singular the premises being seen and fully understood by the said Court of our said Lady the Queen now here, because it appears to the said Court here *34] that the said verdict, *so given against the said O. W. K. as aforesaid, was unduly given, therefore the said verdict is, by the Court here, vacated and made void; and, all other process ceasing against the jury before impannelled, the sheriff of the said county of Middlesex is commanded that he cause a jury anew thereupon to come before our said Lady the Queen, at Westminster, on Monday the 31st day of January in this same term, by whom the truth," &c., "to try, upon their oath, whether the said O. W. K. be guilty of the premises aforesaid or not, because as well the said C. F. Robinson, who for our said Lady the Queen," &c., "as the said O. W. K., have thereupon put themselves upon the said last-mentioned jury. The same day is given as well to the said C. F. R.," &c., as to the said O. W. K. The jury process was then continued to the trial; and the record set out the return of the postea, with the finding of Guilty, in the same terms as before. Then followed prayer of judgment, continuance by cur. adv. vult., and the judgment of the Court of Queen's Bench, "that he, the said Oliver Waterloo King, for the offence charged upon him in and by each and every count of the indictment aforesaid, be imprisoned in the Queen's prison for the space of eight calendar months now next ensuing,"

and "he, the said O. W. K., is now here in court committed" in execution of the judgment.

King brought error upon this judgment: and the Coroner joined.

The case was argued in this vacation (June 13th), before COLTMAN, MAULE, CRESSWELL, and WILLIAMS, Js., and PARKE, ALDERSON, ROLFE, and PLATT, Bs.(a)

**Pashley*, for the plaintiff in error (defendant below).—The indictment does not sufficiently connect the affidavit with the action. [*35 The second count does not even show that, at the time when the oath was made, there was any action at all. [MAULE, J.—I think it has been held that the affidavit in such a case may be sworn before the writ of summons issues. PARKE and ALDERSON, Bs., concurred.] If the Court adhere to the decision of the Court of Exchequer in *Schletter v. Cohen*, 7 M. & W. 389,† the objection certainly fails.

Secondly, the process upon which the jurymen are summoned, on whose verdict the consideration and judgment rest, is erroneous. The record states, as to the first verdict, that "it appears to the said Court here that the said verdict, so given against the said O. W. King as aforesaid, was unduly given;" and that verdict is thereupon vacated and another venire awarded. The fault in the first verdict ought to be specified. That the defect making a venire de novo necessary should be shown on the record appears from the language of PARKE, B., in *Gee v. Swann*, 9 M. & W. 685.† There Bro. Abr., *Verdict*, pl. 17, 18, *Proces*, pl. 72, *Venire facias*, pl. 15, 16, is cited, with other authorities, showing causes for which a venire de novo may be awarded. In *Mounson & West's Case*, 1 Leon. 132, (b) an objection was taken that the jury had eaten; and the fact was put on the record, and the effect discussed. [PARKE, B.—The Court of Error always could give a right judgment in favour of the defendant in the indictment: now, by stat. 11 & 12 Vict. c. 78, s. 5, a right judgment may be given against him, where the original judgment against *him was erroneous.] Sup- [*36 posing the statute applicable to a case like this, it is not easy to see how it is to be carried into effect. In the note to *Gould v. Oliver*, 2 M. & G. 238, note (b) (E. C. L. R. vol. 40), the reporters explain the difference between a venire de novo and a new trial: the latter is a relief, given by the Court in the exercise of a discretionary power, against a latent grievance: the former is matter of right in respect of something appearing on the record. In the case of a new trial, the first trial does not appear on the record at all. Some analogy may be drawn from the case of the discharge of a jury, which was much discussed in *Conway v. The Queen*, 7 Irish Law Rep. 149, (c) where the

(a) COLTMAN, J., and ROLFE and PLATT, Bs., left the Court towards the close of the argument on this day.

(b) See *Downhall and Catesby's Case*, 4 Leon. 113.

(c) See *M. C. Newton's Case*, 13 Q. B. 716 (E. C. L. R. vol. 66).

fact of the discharge of the jury, and the reason for it, appeared by plea on the record, and were considered by the Judges on a writ of error. It is manifest that this is necessary: otherwise a Judge, who expected a verdict contrary to his own wishes, might arbitrarily discharge the jury; and the writ of error is founded on the assumption that the Court below may do wrong, as was pointed out by COLTMAN, J., and by Lord COTTENHAM, in *O'Connell v. The Queen*, 11 Cl. & F. 155, 271, 392. In cases which are only technically criminal, as for instance cases of indictment for non-repair, it was doubted whether a new trial could be granted after verdict for the defendant; *Rex v. Sutton*, 5 B. & Ad. 52 (E. C. L. R. vol. 27.) (a) In cases of new trial, if it appeared on the record that the Court below had thought the verdict on the first trial against the evidence, that, perhaps, might be properly assumed in the Court of Error as conclusively showing that it was

*37] *so. [PARKE, B.—In *Rex v. Mawbey*, 6 T. R. 619, 640, where, upon an indictment for a conspiracy, two defendants had been acquitted and two convicted, LAWRENCE, J., said, upon an application on behalf of the last two for a new trial, that two modes had been suggested to meet the difficulty arising from the right of the defendants who had been acquitted to have the first venire on the record: “The one was to alter the first venire; the other, to make an entry on the record that the verdict against two of the defendants was improperly given, and then to award a new trial as far as respected them. I do not know that the first mode is objectionable. In civil actions no notice at all is taken on the record of the first venire when a new trial is granted: and if we were to grant a new trial in this case in respect of two of the defendants, I see no objection to altering the first venire as to them and to let it stand as to the other defendants who were acquitted. The second mode suggested has already been adopted; it was so in *Rex v. Robins*, (b) after great consideration; where the Court made an entry that it appeared to them that the verdict was unduly given, therefore the verdict is by the Court set aside and the sheriff is commanded to summon a new jury. And that was in the case of a criminal proceeding.” The mode in which the record in *Rex v. Robins* was made up is stated in the argument in *Rex v. Mawbey*, 6 T. R. 626.] In *Rex v. Mawbey*, 6 T. R. 638, Lord KENYON certainly asserts in very broad terms the right of the Court to grant a new trial in cases of misdemeanor. That case was assented to by COLERIDGE, J., in *Regina v.*

*38] *Gompertz, 9 Q. B. 824, 842 (E. C. L. R. vol. 58). [MAULE, J.—Suppose a Court has granted a new trial on the ground that the jury was improperly influenced: it should seem that this is just what ought not to be placed on the record.] That is not the state of things now before the Court. In *Rex v. Tremearne*, 5 B. & C. 254 (E. C. L.

(a) See note (a) to *Regina v. Chorley*, 12 Q. B. 515 (E. C. L. R. vol. 64).

(b) Cited in *Rex v. Mawbey*, 6 T. R. 626.

B. vol. 11), the Court granted a new trial after a verdict of Guilty, because (though without collusion by either party) a person not summoned on the panel had served as juryman: that, more properly, was ground for error in fact which should have appeared on the record. [PARKE, B.—Is this properly a *venire de novo*? It does not issue upon error assigned. Can we not say that we see this to be only a grant of a new trial?] The record does not allow that. [PARKE, B., mentioned *Gray v. The Queen*, 11 Cl. & F. 427.] The plaintiff in error has the right to impeach the proceedings of the Court below. The denial of a bill of exceptions in criminal cases furnishes no just analogy the other way: the reasons given for that practice, in *Vane's Case*, Kelyng, 14, 15,(a) would hardly be upheld now. [ALDERSON, B.—I heard the case of *Rex v. Creevey*(b) tried before Mr. Justice LE BLANC: and I recollect that he refused to receive a bill of exceptions.] That case was mentioned in *King v. Simmonds*, 1 H. Lds. Ca. 754, 764, in the House of Lords; and Lord BROUGHAM said that the Statute of Westminster the Second (1 stat. 13 Ed. 1, c. 31) was distinctly held to apply to misdemeanours in *Rex v. Creevey*. *[ALDERSON, B.—Then why did not Lord BROUGHAM raise the question, as counsel for the defendant, in *Rex v. Creevey*?(c) He moved for a new trial.] *Rex v. Mawbey*, 6 T. R. 619, was mentioned in *Regina v. Gamble*, 16 M. & W. 384, 412, and, so far as relates to the power of granting new trials, was not disputed.

Next, the record of the indictment sets out that it “was presented,” instead of “is presented,” which is wrong; *Rex v. Perin*, 2 Saund. 393.(d)

Further, the language of the judgment is irregular and unmeaning. It passes one sentence of imprisonment for “the offence charged” “in and by each and every count.” [MAULE, J.—The verdict finds that he has done all that he is charged with: upon that he is liable to the punishment. If your complaint is that the word “offence” is used instead of “offences,” the question becomes merely one of grammar. PARKE, B.—I think the judgment means that he is to be imprisoned for the same period of eight months for each offence; the “eight calendar months now next ensuing.”] In *Rex v. Salomons*, 1 T. R. 249, a similar objection was sustained; and, in *Rex v. Powell*, 2 B. & Ad. 75 (E. C. L. R. vol. 22),(e) Lord TENTERDEN, though he distinguishes between the words “misdemeanour” and “offence,” holding the former

(a) See note to *Vane's Case*, 6 How. St. Tr. 131, 132.

(b) See the case in Banc, 1 M. & S. 273, where a rule for a new trial, on the ground of misdirection, was moved for and refused.

(c) See ante, p. 38, and note (b), *ibid*.

(d) The word “was” appears to be only part of the narrative, in this Court, of what took place before the certiorari, and to be therefore proper.

(e) See *Ryalls v. The Queen*, 11 Q. B. 781 (E. C. L. R. vol. 63); *Campbell v. The Queen*, 11 Q. B. 799.

to be nomen collectivum, yet appears not to deny the propriety of the objection to the use of the word "offence." [PARKE, B.—Suppose *40] *the word "matter" had been used.] That would be very vague.

PARKE, B.—We should like to see the precedent in *Rex v. Robins*, mentioned in *Rex v. Mawbey*. We shall affirm the judgment, as to this point, without calling on the counsel for the defendant in error, if we find that precedent agreeing with the present record. The only question as to the form of entry would be, whether there is error in putting on the record this reason for ordering a new trial, instead of simply ordering it. I do not see why this form should not be pursued. It is true that in civil cases no entry is made as to the first trial, when a second trial is ordered; and it is desirable that there should be none, because no writ of error would lie on the order for a new trial: and that course might be also pursued in criminal cases. But I see nothing erroneous in adopting this form: and, if we find precedent for it, we shall affirm the judgment.

As to the time of swearing the affidavit, it is the constant practice to swear it before the writ of summons issues.

The other Judges concurred.

ALDERSON, B.—As to the question respecting the bill of exceptions, you will probably find some information in Sir D. Evans's Collection of Statutes.(a)

(C. Clark was to have argued for the Crown.)

Cur. adv. vult.

On the next day (June 14th),

*41] *Pashley pointed out that, in *Rex v. Mawbey*, 6 T. R. 619, 627, although Lord KENYON had asserted the general right of granting a new trial, he had expressed a wish that the whole should be placed on the record if a new trial were granted: but that, in fact, the rule for a new trial had been discharged. He added that *Rex v. Robins*, 6 T. R. 626, was a case of quo warranto, which partakes of the nature of a civil action. [PARKE, B.—There is nothing in that distinction.] He further referred, as to the extent of the power of the Court to order a new trial, and the mode of entering such order on the record, to *Fisher v. Birrell*, 2 Q. B. 239 (E. C. L. R. vol. 42), and *Rex v. Fowler*, 4 B. & Ald. 273 (E. C. L. R. vol. 6).

Later in the same day,(b)

C. Clark, for the Crown, stated that search had been made for the record in *Rex v. Robins*, 6 T. R. 626, but that it could not be found. He produced, however, two drafts of indictments, which had been obtained from the Crown Office. The first was *Rex v. William Smith, Henry Smith and John Smith*, of Trinity term, 1828. In this case the

(a) See vol. 3, p. 341, note (1), 3d ed.

(b) *Ex relatione* C. Clark.

postea set forth an acquittal of John Smith on the whole indictment, and a conviction of the other two defendants on the second, third, and fourth counts, and an acquittal of them as to the residue : then followed the judgment that John Smith should be discharged and go without day : “and hereupon the said *Edmund Henry Lushington*, who prosecuteth for our said Lord the King in this behalf, prayeth the judgment of the said Court here against the said William Smith and Henry Smith upon the verdict aforesaid *so given against them as aforesaid :” then [*42 followed several continuances by cur. adv. vult., and an appearance, on the last day given, by the Coroner and W. Smith and H. Smith, and prayer of judgment : “whereupon, all and singular the premises being seen,” &c., “because it appears to the said Court here that the said verdict, so given against the said William Smith and Henry Smith as aforesaid, was unduly given. Therefore the said verdict, so far as respects the said William Smith and Henry Smith, is by the Court here vacated and made void ; and, all other process ceasing against the jury before impannelled, the sheriff of the said county of Monmouth is commanded that he cause a jury anew thereupon to come before our said Lord the King, on,” &c., wheresoever, &c., “by whom the truth,” &c., “to try upon their oath whether the said William Smith and Henry Smith are, or either of them be, guilty of the premises aforesaid, or not ; because as well the said *E. H. L.*, who for our said Lord,” &c., “as the said W. S. and H. S., have thereupon severally put themselves upon that same last-mentioned jury. The same day is given,” &c. “At which time,” &c.(a) The other record was of Michaelmas term, 1833, *Rex v. Hodgson* and three others, one of whom was acquitted, three convicted : there was a new venire as to the three who were convicted ; and the entry corresponded in form to that in *Rex v. Smith*.

PARKE, B.—That is quite sufficient to authorize us in affirming the judgment in the present case. Judgment affirmed.

(a) The Reporters are informed by Mr. Robinson, the Master of the Crown office, that this entry was drawn by himself from the record in *Rex v. Robins*.

*The QUEEN v. GRANT and Others.

[*43

By the rules of a Friendly society, any member rendered by illness incapable of working was to receive, as long as he continued unable to work, a weekly allowance, and was not allowed to do any kind of work except receiving or paying money, giving verbal orders, or signing his name ; any member attempting to defraud the Society was to be excluded : all matters in dispute between the Society and any individual member were to be referred to arbitration ; the arbitrators were to hear evidence on both sides, and their decision was to bind all parties and be final.

Justices, under stat. 4 & 5 W. 4, c. 40, s. 7, made an order, finding that it was proved before them, on oath, that J. had been a member for eighteen months ; that, by the rules, disputes were to be referred as above ; that, for nine calendar months, J. was by illness rendered inca-

pable of working, and received a weekly allowance, till the Society refused to pay him, and expelled him; that a dispute thereon arose, which was referred to arbitrators in pursuance of the rules; that the arbitrators had been called on by J. to hear evidence on both sides, and to make their award, but had *wholly neglected and refused* to make such award; that J. complained to a justice, and obtained a summons against the president, who, with J., appeared before the justices making the order; and the justices by the order found the allegations to be true, and ordered J. to be reinstated in the Society.

The order was brought up by certiorari, and motion was made to quash it, on affidavit that the parties had met before the arbitrators, when evidence was given on the part of the Society, and, J., being called upon for his defence, said that the evidence was true, adding that he had witnesses as to his character (which was not in dispute), and no other witnesses: whereupon the arbitrators awarded that J. should be expelled; and that these facts had been proved before the justices.

In answer, it was sworn that J. had been charged with an act amounting to working while receiving the allowance; that he had, at the meeting before the arbitrators, tendered evidence material to the merits of the case; but that the arbitrators had refused to hear it, and had decided *ex parte* on the evidence given for the Society; and that J. had not stated as alleged in the affidavit on the other side.

Held: that the finding by the justices of the arbitrators having neglected to award was not conclusive, that being a fact preliminary to the jurisdiction of the justices: but that, there being contradictory evidence before the justices on the question whether the arbitrators had refused to hear evidence on behalf of J., the justices were warranted in considering the refusal proved; and, if they did so consider, in finding that there was no award according to the rules of the Society; and therefore that their order was not made without jurisdiction, and was good.

It was deposed that the Society was formed within the borough of Leeds, which is within the West Riding of Yorkshire, but has a Court of Quarter Sessions, and justices with exclusive jurisdiction; that all the meetings were held, and all the business transacted, and the award made, within the borough; but that J. resided, and the act with which he was charged took place in the West Riding, without the borough.

Held: that the justices of the West Riding had jurisdiction to hear J.'s complaint and make the order.

PASHLEY, in Michaelmas term, 1847, obtained a rule calling on the prosecutors in this case to show cause why the following order, which had been brought up by certiorari, should not be quashed for insufficiency.

*44] “To the President, Stewards, and Members of the friendly society called The Leeds Philanthropic Society, held at Leeds, in the West Riding of the county of York.

“West Riding of Yorkshire, to wit. Be it remembered that it is now here proved to us, the undersigned Joseph Holdsworth, Edward Tew, and John George Smith, Esquires, three of Her Majesty's justices of the peace acting in and for the West Riding of the county of York, upon oath, on the hearing of the complaint hereinafter mentioned, that Philemon Jaques, of Wakefield in the said Riding, shoemaker, for eighteen calendar months and upwards before the making of the said complaint, had been and was admitted a member of a certain friendly society, called The Leeds Philanthropic Society, duly established and holden at Leeds, in the said Riding, under a certain act,” &c. (10 G. 4, c. 56), “To consolidate and amend the laws relating to friendly societies”(a) pursuant to *the provisions of the statutes in
*45] such case made and provided; and that the rules, orders, and regulations of

(a) Sect. 27 enacts: “that provision shall be made by one or more of the rules of every such society, to be confirmed as required by this act, specifying whether a reference of every matter in dispute between any such society, or any person acting under them, and any individual member thereof, or person claiming on account of any member, shall be made to such of his Majesty's justices of the peace as may act in and for the county in which such society may be formed, or to arbitrators to be appointed in manner hereinafter directed.” The section they specifies how arbitrators are to be appointed. “And whatever award shall be made by the said arbitrators, or the major part of them, according to the true purport and meaning of the rules

the said Society were, before the arising of the dispute hereinafter next mentioned, duly confirmed and enrolled, according to the directions of the said statutes: and that, before and at the time of the arising of the said dispute, and from thence continually until and at the time of the making of the said complaint, all matters in dispute between the said Society, or any person acting under it, and any individual member or person claiming on account of any member were, according to the said rules, orders, and regulations, to be referred to the arbitration of certain persons to be appointed as arbitrators, as in the said rules, orders, and regulations is mentioned, who should hear evidence on both sides. And that, for nine calendar months before the making of the said complaint, the said P. Jaques, by illness, to wit, a diseased spine," was "rendered incapable of working, and, during the time aforesaid of his said illness, received a certain allowance, to wit, the sum of 9s. per week from the funds of the said Society, until the 24th day of October now last, being the allowance which, during the time last aforesaid, he was entitled to receive from the funds of the said Society as such sick member as aforesaid of the said Society. That on the 2d day of November now last, the said Society, at a club night thereof, held in the said Riding, refused further to pay any such allowance to the said P. Jaques, and then and there, without any sufficient cause, unjustly, illegally, and contrary to the rules of the said Society, and to the statutes in that case made and provided, expelled the said P. Jaques from the said Society, and excluded him from all the benefit and advantage which he then, and thenceforward continually until the making of the said complaint, had a right to have and claim from the said Society; and from the said 2d day of November continually hitherto have refused, and still refuse, to reinstate the said P. Jaques as a member of the said Society, and to permit him to receive thereto from such benefit and advantage as aforesaid. That *a dispute did thereupon, [*46 on the 2d day of November, arise between the said P. Jaques and the said Society touching the said expulsion and exclusion, he, the said P. Jaques, then and there asserting to the said Society that his aforesaid expulsion and exclusion was then and there wrongful, and that he, the said P. Jaques, ought forthwith to be restored to the full enjoyment of his rights as a member of the said Society: which said assertions were then and there denied by the said Society. That the said P.

of such society, confirmed by the justices according to the directions of this act, shall be in the form to this act annexed, and shall be binding and conclusive on all parties, and shall be final, to all intents and purposes, without appeal, or being subject to the control of one or more justices of the peace, and shall not be removed or removable into any court of law, or restrained or restrainable by the injunction of any court of equity." Provision is then made for enforcing performance of the award by summons before two justices, and distress.

Sect. 28 enacts: that, if the rules direct that any matter in dispute be "decided by justices of the peace," "any such justice," on complaint, may grant a summons; and it shall be lawful "for any two justices" to hear and determine the complaint according to the rules of the society: and provision is made for enforcing any adjudication they may make for payment of money.

Stat. 4 & 5 W. 4, c. 40 ("to amend an act of the 10th year of His late Majesty King George the Fourth, 'to consolidate' " &c.) recites, in sect. 7, the provision of the former act for referring to justices or arbitrators, and enacts: "That when the rules of any society provide for a reference to arbitrators of any matter in dispute, and it shall appear to any justice of the peace, on the complaint on oath of a member of any such society, or of any person claiming on account of such member, that application has been made to such society, or the steward or other officer thereof, for the purpose of having any dispute so settled by arbitration, and that such application has not within forty days been complied with, or that the arbitrators have neglected or refused to make any award, it shall and may be lawful for such justice to summon the trustee, treasurer, steward, or other officer of the society, or any one of them against whom the complaint is made, and for any two justices to hear and determine the matter in dispute, in the same manner as if the rules of the said society had directed that any matter in dispute as aforesaid should be decided by justices of the peace, anything in the said recited act contained to the contrary notwithstanding."

Jaques thereupon, on the 3d of November aforesaid, made application there to James Ingham, then and there being the president for the time being of the said Society, for the purpose of having the said dispute settled by arbitration, pursuant to the said rules, orders, and regulations, and to the provisions of the said statutes in such case made and provided: and the said P. Jaques and the said Society thereupon referred the said matter in dispute to William Fieldhouse, William Marshall, and John Darby, arbitrators appointed in that behalf pursuant to the said rules, orders, and regulations, and the provisions of the statutes in such case made and provided, who should hear evidence on both sides, and finally decide the said matter in difference." That "though the said arbitrators had often, before the making of the said complaint, been called upon by the said P. Jaques to hear evidence on both sides touching the said matter in dispute, and to make their award therein, they the said arbitrators have, until and at the time of the making of the said complaint, and from thence continually hitherto, wholly neglected and refused so to do, and still neglect and refuse so to do. And that the said P. Jaques afterwards, to wit, on the 21st day of December now last past, at Wakefield in the said Riding, did make his complaint to John George Smyth, Esquire, one of her Majesty's justices of the peace acting in and for the said Riding and then residing within the said Riding." The order then recited a complaint upon oath by Jaques, before the single justice, stating (substantially as above) that he was a member of the Society, that the rules provided for a reference to arbitrators, that he had been a member for eighteen months, and had for nine months then last past been rendered by illness incapable of working, and had received his allowance until the 24th October, and had been expelled on the 2d November, without cause; that a dispute had, in consequence, arisen between him and the Society, and he had applied to Ingham for the purpose of its being settled by arbitrators, "but the said arbitrators had neglected and refused, and still did neglect and refuse, to make any award in the premises. Wherefore the said P. Jaques prayed that George Grant," president of the Society for the time being, "might be summoned to answer the said complaint, and that two of Her Majesty's justices of the peace for the said Riding might hear and determine the matter in dispute, pursuant to the statutes in such case made and provided. And be it further remembered that thereupon," &c.; the order then set forth that Grant had been summoned, and *47] the *parties had appeared and the hearing had been adjourned upon Grant's request to the day of making the order, when the parties appeared before the Justices. "Whereupon we, the said Justices, have now here proceeded to hear and determine, and have heard and determined, upon lawful evidence, upon oath taken before us on this said hearing, the matter of the said complaint, according to the true purport and meaning of the said rules, orders, and regulations of the said Society, and according to the directions of the statutes in such cases," &c. "And we, the said Justices, do hereby, on the hearing aforesaid, adjudge and determine that all and singular the premises and allegations aforesaid are true; and thereupon we do order and adjudge, by virtue of the statutes in such case," &c., "that the said P. Jaques be forthwith reinstated in the said Society, and readmitted into all the benefits and advantages thereof. And we do order and require you, the president, stewards, and members of the said Society, forthwith to reinstate the said P. Jaques in the said Society, and readmit him into all the benefits arising therefrom accordingly. Given," &c., "at the Court House at Wakefield, in the Riding aforesaid," 11th January, 1847. Signed and sealed by the three justices.

In support of the rule, Grant deposed that the order was made at a petty sessions held at Wakefield, in and for the West Riding: that the Society was and is established at and in the borough of Leeds, and the meetings and business connected therewith had always been holden and transacted within the borough. By other affidavits, the rules of the

Society were verified ;(a) *and it was further deposed that a meet- ing before the arbitrators, for the hearing of the said parties, was [*48 "duly appointed, touching the matters in difference; of which said meeting the said P. Jaques had due notice: and that the said arbitra- tors and the said parties, including the said P. Jaques, met accordingly on the 30th day of November now last, at Leeds aforesaid, and then and there entered upon the said reference. That evidence on the part of the said Society was given at the said meeting before the said arbit- rators, in the presence and hearing of the said P. Jaques; and that the said P. Jaques was then and there called upon to make his defence touching the charges and the matters in dispute aforesaid; and that he, the said P. Jaques, then said that the evidence which had been then given on the part of the said Society was true, but that he had several witnesses to speak as to his character and alleged sickness: and that the said arbitrators then inquired of him, the said P. Jaques, whether he had any further evidence to offer touching the matters in dispute before them; and that he then stated that he had not any witnesses, except such witnesses as spoke *only to his general character; [*49 but which was not a matter in dispute:" "and that they, the said arbitrators, after due consideration of the premises so referred to them as aforesaid, did then and there duly make and sign their award in writing." The award was annexed, and was as follows. "We, the major part of the arbitrators duly appointed by the Philanthropic Society, established at Leeds, in the county of York, do hereby award and order that Philemon Jaques be expelled from the said Society." (Signed by Fieldhouse, Marshall, and Darby.) That the Society was established, and all the meetings thereof held, and the expulsion, dis- putes, matters in difference, arbitration, and award severally took place, and were had, heard, transacted and made within the borough of Leeds,

(a) Rule 11 lays down rules as to notices to be given by sick members, varying according as the member does or does not reside within ten miles of Leeds Bridge.

Rule 12. "When any free member is by any hurt or illness, rendered incapable of working, he shall receive, from the receipt of his declaration (allowing reasonable time for country members to send theirs), and as long as he continues unable to work, 9s. per week, in weekly payments, and for odd days, 1s. 6d. per day (Sunday excepted). No member shall be allowed to do any kind of work during the time he receives the benefit specified in this rule, except receiving or paying money, giving verbal orders to servants or other persons, or signing his name to a receipt or other writing. Every member, on declaring himself off the benefit of this Society, shall deliver, or cause to be delivered, a written notice to that effect, to the steward for the time being, or at his house, before he begins to do any kind of work, or be excluded."

Rule 19 contains provisions for the burial of members, varying according as they die within five miles of Leeds Bridge, or beyond.

Rule 21 provides that, if the president, &c., or any member, attempt to defraud the Society "in any case whatever, all such, against whom clear proof is made to the committee, shall be excluded."

Rule 26. "That all matters in dispute between this Society, or any person acting under it, and any individual member or person claiming on account of any member, shall be referred to arbitration, pursuant to 10th Geo. IV. cap. 56, sec. 27." Provision is then made for the appointment of arbitrators; as to which no point arose in the case. "Such arbitrators shall hear evidence on both sides, and their decision binding to all parties, and shall be final."

and not elsewhere. That the borough has had, for several years continually now last past, a separate Court of quarter sessions of the peace in and for the borough; and the justices in and for the borough have exclusively exercised the jurisdiction of justices of the peace for the borough. That, at the petty sessions before the three justices, the attorney for the Society objected that the justices had no authority to entertain the application, as the matter had wholly arisen at Leeds, and not within the jurisdiction of the justices; nevertheless, the justices proceeded to examine witnesses on the part of Jaques. That, upon cross-examination, it appeared that the arbitrators had made the award; notwithstanding which the justices made the order.

The affidavits in answer stated that the rules of the Society were allowed and confirmed at the quarter sessions for the Riding, and were enrolled and filed at the office of the clerk of the peace for the Riding, *situate at Wakefield. That no part of Wakefield, or the parish
 *50] of Wakefield, is within the borough of Leeds in the West Riding. That, from 14th March, 1846, to 24th October, 1846, Jaques was by illness rendered incapable of working; that, from 4th November, 1845, he had resided at Wakefield, and that he had never resided or carried on business within the borough of Leeds, or elsewhere, except at Wakefield. "That, on the 2d of November, 1846, the said Society, at a club night thereof, held in the said Riding, charged this deponent" (Jaques) "with having, at Wakefield aforesaid, on the 23d day of October, 1846, violated the twelfth rule of the said Society, by reaching, from a window in the house of this deponent, situate at Wakefield aforesaid, a glass containing a spice walking stick of the value of one halfpenny, and receiving one halfpenny for it, the reaching of which said glass, and receiving one halfpenny, the said Society then and there alleged was working, no member being allowed to do any work during the time he was receiving the benefit specified in the said twelfth rule." That Jaques denied that he had done any work; but was expelled. That he attended, with material witnesses (named), on a day and at a place appointed by the Society for hearing before the arbitrators the matters in dispute; but none of the arbitrators attended: and that he again attended, with the same witnesses, on another day and at a place named by the Society; and that the Society there charged him, before the arbitrators, with violating the twelfth rule by the act before mentioned, and did not prefer any other complaint and charge. "That evidence on the part of the said Society was given at the said last-mentioned
 *51] meeting before the arbitrators. *That this deponent" (Jaques), "at the said last-mentioned meeting, requested the said arbitrators also to hear evidence on behalf of this deponent touching the merits of the said matters in dispute. That, during the said last-mentioned meeting, the said witnesses for this deponent were in one of the rooms of the house in which the said last-mentioned meeting was held, waiting

to give evidence, and ready and willing then and there to give evidence, before the said arbitrators for and on behalf of this deponent touching the merits of the said matters in dispute. That the said arbitrators, and each and every of them, then and there neglected and refused to hear any evidence on the part of this deponent; and the said arbitrators, or any of them, did not hear any evidence on behalf of this deponent; and the said arbitrators did then and there, on the ex parte evidence produced on behalf of the said Society, and without first hearing evidence on both sides touching the said matters in dispute, award that this deponent be expelled from the said Society. That this deponent, at said last-mentioned meeting, did not say that the evidence which had been given on the part of the said Society was true, nor anything to that or the like effect; nor that he had several witnesses to speak as to his character and alleged sickness, nor anything to that or the like effect. That the said arbitrators did not then inquire of him, this deponent, whether he had any further evidence to offer touching the matters in dispute before them. That he, this deponent, did not, at the said last-mentioned meeting, state that he had not any witnesses except such witnesses as spoke only to his general character, nor any words to that or the like effect. That, at the said last-mentioned meeting, this deponent *informed the said arbitrators that he had [*52 evidence touching the matters in dispute, and the merits of the said matters in dispute; and that his said witnesses were in one of the rooms of the said house at which the said last-mentioned meeting was held, ready and willing to give their evidence on behalf of this deponent; and that the said arbitrators then refused to hear the said evidence, or examine this deponent's witnesses." "That the said," &c. (the witnesses for Jaques before named), "were material and necessary witnesses for and on the behalf of this deponent, touching the said matters in dispute, and the merits," &c.; "and that the said witnesses, or any of them, were not to speak as to the character and alleged sickness of this deponent. That the said arbitrators, or any of them, could not decide the said matters in dispute justly, candidly, and impartially, on the ex parte evidence on the part of the said Society, and without hearing the evidence on behalf of him, this deponent, touching the merits of the said matters in dispute." "That the said dispute and matters in difference did not arise and take place at and within the borough of Leeds aforesaid, but at Wakefield aforesaid." That it was proved on oath, before the three justices, that the arbitrators "had neglected and refused to hear evidence on behalf of him, the said complainant, and touching the merits of the said matters in dispute; contrary to the 26th rule of the said Society and the said statutes." The witnesses named also deposed that they had attended to give evidence for Jaques, "touching the said matters in dispute, and the merits of the said matters in dispute," without hearing which, the arbitrators could not decide justly.

*53] *In Michaelmas term, 1848,(a)

R. Hall showed cause.—First, it is objected on the other side that, on the facts here shown, the justices acted without jurisdiction, inasmuch as the arbitrators had already made a sufficient award, and the justices could not give themselves jurisdiction, under stat. 4 & 5 W. 4, c. 40, s. 7, by finding, contrary to the fact, that the arbitrators had refused and neglected to award. It is true that the authority must, as this order is framed, rest entirely upon the assumption of that fact. But, upon the complaint being made to the justices, they were bound to ascertain the fact; and their finding on that is conclusive. The affidavits raise a question of disputed fact, whether the award was made without the evidence for the complainant being properly heard: this depends upon the question whether the evidence rejected was material to the complaint. The justices were bound to ascertain this: and they appear to have decided it rightly; for (even on the affidavit in support of the rule) it cannot be taken for granted that the character of the applicant and his state of health might not be circumstances important to the determination of the question whether the act which he did was really work within the meaning of the Society's rules. [WIGHTMAN, J.—If justices may always inquire whether the arbitrators decided rightly, they have in effect an appellate jurisdiction.] The case falls within *Regina v. Bolton*, 1 Q. B. 66 (E. C. L. R. vol. 41); for upon this complaint, the justices clearly had power *to begin the inquiry. The *54] argument on the other side must go the length of showing that the justices would have had no jurisdiction though it had appeared to them that the award had been made without either side being heard. [Lord DENMAN, C. J.—The affidavits in support of the rule say that the only evidence offered and rejected was as to the health and character. If you say that is material, I think you fail: if you say there was other evidence, you are contradicted.] If there be a contradiction as to fact, the Court will uphold the finding of the justices. A bad award is no award. *Harding v. Holmes*, 1 Wils. 122, indeed contradicts this: and in *Wills v. Maccarmick*, 2 Wils. 148, it was decided that, on Nil debet pleaded to debt on award, it could not be shown that the arbitrators had acted corruptly. The former of these decisions cannot be supported; the latter, if correct, is so only with regard to the particular form of pleading. *Braddick v. Thompson*, 8 East, 344, goes farther still, and decides that no plea can raise the question. That case was acted upon in *Grazebrook v. Davis*, 5 B. & C. 534 (E. C. L. R. vol. 11), (b) where, however, the plea seems to have been held insufficient to raise the objection. In *Holland v. Brooks*, 6 T. R. 161, it was laid down that a rule for an attachment cannot be resisted on the ground of

(a) The case was argued on November 15th and 18th, before Lord DENMAN, C. J., COLERIDGE, WIGHTMAN, and ERLE, Js.

(b) See *Willoughby v. Willoughby*, 9 Q. B. 923 (E. C. L. R. vol. 58).

defects not appearing on the face of the award; and *Brazier v. Bryant*, 3 Bing. 167 (E. C. L. R. vol. 11), confirms this: and the rule is so far reasonable, as the party moving for the attachment has no opportunity of answering. But Lord COKE, in *James Osborn's Case*, 10 Rep. 130 a, 131 b, assumes no arbitrement *and a void arbitrement to be "all one in law." [WIGHTMAN, J.—Is he speaking of defects on the [*55 face of the award? In *Fisher v. Pimbley*, 11 East, 188, an award reciting the terms of the submission and showing an inconsistency with those terms was held to be no award.] When the award is impeached for want of authority to act, it clearly is competent to show matter not apparent on the award itself. In *Rudston and Yate's Case*, March, 141, an action of debt was brought on a bond conditioned to perform an award; and the defendant pleaded No award: it appeared, by special verdict, that one of the parties to the submission, not a party to the action, was an infant at the time of the submission: and judgment was given for the defendant. Suppose a submission were to the award of a majority of three arbitrators, and two acted without the third being summoned. [COLERIDGE, J.—In these cases the authority has never vested.] The case last put might almost be termed one of defective procedure. The language of HULLOCK, B., in *Rex v. Bingham*, 3 Y. & J. 101, 110,† seems to carry the principle of avoiding an award for invalidity beyond the case of a defect apparent on the award. In *Hickes v. Cracknell*, 3 M. & W. 72,† debt was brought on a bond conditioned for the payment of an annuity; and the defendant pleaded that no memorial was enrolled containing names of witnesses, date of bond, &c., and pecuniary consideration: replication, that a memorial was enrolled, which was set forth, with verification by the record: rejoinder, that the memorial contained false statements of fact: and this was held a good rejoinder *and no departure. In *Gisborne v. Hart*, 5 M. & W. 50,† it was held that a plea that the arbitrator did not duly make [*56 and publish his award concerning the premises referred would have been supported by evidence, dehors the award, that the award did not dispose of all the issues. Accordingly, in *Dresser v. Stansfield*, 14 M. & W. 822,† it was decided that, in an action of debt on an award, a special plea showing that the arbitrator had not awarded on all the issues was bad on special demurrer, as amounting to a traverse of the award having been made.

Secondly, it is objected that the justices had no jurisdiction in respect of place. The statute gives them jurisdiction as arbitrators: it is not exercised under their general commission. Sect. 27 of stat. 10 G. 4, c. 56, requires that the rules shall specify whether reference of the disputes is to be made to justices of "the county in which such society may be formed," or arbitrators. By the interpretation clause, sect. 38, "county" will "include county, riding, division, or place." But, as these rules have directed that the reference shall be to arbitrators, no

justices could, as such, act under this statute: if they could, it might be questioned whether, as Leeds is within the ambit of the Riding, the Riding justices might not act. Then stat. 4 & 5 W. 4, c. 40, s. 7, enacts that, when the rules refer the disputes to arbitrators, and they have neglected or refused to make the award, "any justice of the peace" may summon the trustees, &c., and "any two justices" may hear and determine. Supposing this to be restrained by the language of the earlier statute, still it does not appear that this Society *was
*57] formed within the borough. Rules 11 and 19 clearly contemplate the residence of members at a distance of more than five miles from Leeds Bridge: the rules have been confirmed at the Riding Sessions, and enrolled with the clerk of the peace of the Riding: and, by sect. 4 of stat. 4 & 5 W. 4, c. 40, that must be done at "the county wherein such society shall be formed;" and sect. 7 of stat. 10 G. 4, c. 56, directed that a transcript of the rules should be deposited "with the clerk of the peace for the county wherein such Society shall be established." Now it appears by the affidavit that the borough possessed a Court of quarter sessions at which the confirmation might have taken place, if the Society was considered to be established there. Besides, the applicant himself resided without the borough, and was, in law, excluded and reinstated where he resided: the locality of the Society depended on the locality of its members. Further, the matter in dispute arose without the borough. If, under the old law as to juries, there had been on the record, in a civil action, an allegation of refusal to make an award, and issue had been joined on the cause of expulsion, the trial must have been by a jury of the Riding; 21 Vin. Abr. 98, *Trial* (M. a).

Pashley, contra.—First: Under stat. 10 G. 4, c. 56, if the rules had directed a reference to arbitrators, and the arbitrators had neglected and refused to act, the only remedy must have been by mandamus. Then stat. 4 & 5 W. 4, c. 40, s. 7, gives the justices power in such a case. As the facts are here stated, the justices had no power unless there had been such neglect and refusal. Now it is sought to show that *there was such neglect and refusal because the arbitrators refused
*58] to hear evidence touching the merits. But the affidavit does not even raise this point properly; for it is not deposed in what respect the evidence was to affect the merits. And it is clear that a mere misruling of the arbitrators as to materiality of evidence does not constitute a neglect to act; if it did, it would also support a plea that no award had been made: but a series of cases, many of which have been cited on the other side, show that that is not so; *Braddick v. Thompson*, 8 East, 344, *Grazebrook v. Davis*, 5 B. & C. 534 (E. C. L. R. vol. 11), *Johnson v. Durant*, 2 B. & Ad. 925 (E. C. L. R. vol. 22), and the authorities in notes (3), (k), and (l) to *Veale v. Warner*, 1 Wms. Saund. 327 a (6th ed.) Cases in which this Court has refused to interfere by mandamus, where the tribunal below has exercised its judgment, are

analogous in principle. Such are *Rex v. The Justices of Cumberland*, 1 M. & S. 190, *Rex v. The Justices of Carnarvon*, 4 B. & Ald. 86 (E. C. L. R. vol. 6), (a) *Rex v. Justices of Cambridgeshire*, 1 Dowl. & R. 325 (E. C. L. R. vol. 16), *Rex v. The Justices of Leicestershire*, 1 M. & S. 442, *Rex v. The Justices of Monmouthshire*, 4 B. & C. 844 (E. C. L. R. vol. 10), *Regina v. Kesteven*, 3 Q. B. 810 (E. C. L. R. vol. 43), (b) and other cases overruling *Regina v. The Justices of Carnarvonshire*, 2 Q. B. 325 (E. C. L. R. vol. 42), and *Regina v. The Justices of The West Riding*, 2 Q. B. 331 (E. C. L. R. vol. 42); and, as to a certiorari, another case of *Rex v. The Justices of Monmouthshire*, 8 B. & C. 137 (E. C. L. R. vol. 15). [Lord DENMAN, C. J.—All these authorities are against you, if *the justices had jurisdiction.] They are: but the justices had no jurisdiction unless the conduct of the arbitrators [*59 was such as to make their decision no award; and, on this question, the cases are strong in favour of the rule. The question is really the same which would have arisen under stat. 10 G. 4, c. 56, s. 27, on an attempt to review the decision of arbitrators. [COLERIDGE, J.—Do you say that the justices were wrong in beginning the inquiry?] They were not; because the complaint alleges the neglect and refusal; but they should have desisted when it appeared that the matter was not within their jurisdiction. That is quite consistent with *Regina v. Bolton*, 1 Q. B. 66 (E. C. L. R. vol. 41), which in fact goes no further than *Britain v. Kinnaird*, 1 Br. & B. 432 (E. C. L. R. vol. 5), and *Basten v. Carew*, 3 B. & C. 649 (E. C. L. R. vol. 10); in the latter case HOLROYD, J., expressly limits the principle of the decision to cases where there is jurisdiction. If a County Court Judge find that a question of title to land arises, he must desist, under stat. 9 & 10 Vict. c. 95, s. 58. He must indeed decide whether it does so arise: but this Court will review his decision, and, if it be erroneous in this respect, will prohibit for want of jurisdiction. (c) In *Welch v. Nash*, 8 East, 394, (d) justices found, on the face of an order, the fact (of a new road having been set out) which was essential to their jurisdiction; and the order was confirmed at Sessions; but it was held that this finding might be disputed in an action of trespass. *Crisp v. Bunbury*, 8 Bing. 394 (E. C. L. R. vol. 21), and *Rex v. *Mildenhall Savings Bank*, 6 A. & E. 952 (E. C. L. R. vol. 33), show the disposition of the Courts to leave these ques- [*60 tions to the decision of arbitrators. The cases cited on the other side, where the award showed that the submission had not been pursued, or where the submission was itself invalid, are inapplicable. There is nothing in *Gisborne v. Hart*, 5 M. & W. 50,† and *Dresser v. Stansfield*, 14 M. & W. 822,† which goes farther than to show that an award may

(a) See the judgment of HOLROYD, J.

(b) See *Regina v. Deputies of Freemen of Leicester*, 15 Q. B. 671 (E. C. L. R. vol. 69).

(c) See *Lilley v. Harvey*, 5 Dowl. & L. 648. Also *Thompson v. Ingham*, February 26, 1850, post.

() See *In the Matter of Pratt*, 7 A. & E. 27 (E. C. L. R. vol. 34).

be impeached where it appears, even by matter dehors the award, not to be made de præmissis.

Secondly, the justices of the West Riding could not act in the matter, inasmuch as the Society was formed at Leeds. Stress is laid on the words, in stat. 4 & 5 W. 4, c. 40, s. 7, "any two justices:" but, if that be a correct argument, the order might have been made by justices of Middlesex. Such words apply only to justices having jurisdiction in the place, either by common law or statute; In the Matter of Peerless, 1 Q. B. 143 (E. C. L. R. vol. 41). Then it is said that Jaques resided out of Leeds, and that the act which gave rise to the dispute occurred also out of Leeds. But, as before argued, if the residence and the act had been in Middlesex, would justices of Middlesex have had jurisdiction? The justices of Leeds clearly had jurisdiction; and it can hardly be a case of concurrent jurisdiction. [*R. Hall* referred to *Rex v. Sainsbury*, 4 T. R. 451.] The Court will not favour a construction attended with so much inconvenience. It has been pointed out that the *61] rules were confirmed and enrolled in the Riding: but that could *not legally be done; and this would destroy the jurisdiction altogether. [COLERIDGE, J.—Then the arbitrators had none.] The question now before the Court is on the validity of the order of the justices. *Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation (June 21st), delivered the judgment of the Court.

On a motion to quash an order of justices brought up by certiorari, it appeared by the affidavits that the complainant had applied to arbitrators duly appointed according to the statute; that they had, in fact, made an award between the complainant and the Friendly society; that the complainant, treating the award as void and null, had then applied to justices, who made the order in question, and therein declare that the arbitrators had neglected and omitted to make any award; this being the condition on which their jurisdiction to take cognisance of the dispute depends.

Upon these facts, the question has been, whether the statement in the order, that the arbitrators had neglected and omitted to make an award, was conclusive.

It is clear that the decision of a tribunal lawfully constituted upon a question properly brought before it, respecting a matter within its jurisdiction, is not open to review on certiorari; *Regina v. Bolton*, 1 Q. B. 66 (E. C. L. R. vol. 41): but the decision of persons, assuming to be a tribunal, that they are lawfully constituted, is open to review. Thus a decision, either by a justice that he was in the commission, or by an arbitrator under a statute that he was duly appointed, or by a *62] sheriff that a valid writ of trial *had issued to him, might be shown by affidavit to be untrue.

In the present case, the justices are in the nature of second arbitrators,

the reference being conditional upon the first arbitrators neglecting or omitting to award: and their decision that this condition existed is a decision upon one of the preliminaries necessary for constituting them a lawful tribunal for this matter. It is, therefore, not conclusive within the principle laid down in *Regina v. Bolton*, but falls within the latter of the two limitations of it there mentioned.

The first limitation is: where, on the proceedings leading to the adjudication, a want of the jurisdiction appears, a decision asserting jurisdiction is of no avail. Of this, *Welch v. Nash*, 8 East, 394, is an example; in which case the jurisdiction to order the stopping up of an old highway, after being diverted and turned, depended upon the setting out of a new way in lieu of the old one; and it appeared that no new way had been set out, but an old way had been widened in different parts; this fact was apparent from the proceedings themselves, as maps were annexed to each order; and the oral evidence for the defendant could do no more than explain and apply the maps. The judgment was, that the magistrates could not make the widening of an old way in parts a setting out of a new way by stating it to be so in their adjudication and order.

The second limitation is, where the charge is really insufficient, but is misstated in drawing up the proceedings, so that they appear regular. In such case it is competent to the defendant to show by affidavit what the real charge was; and, if that shows that the magistrate ought never to have begun the inquiry, the order is to be quashed. [*63]

We have, therefore, in the present case, found it our duty to inquire whether the statement in the order respecting the neglect and refusal of the arbitrators to make an award was true. The admitted facts are, that arbitrators were duly appointed, and that the parties attended before them, and that an instrument purporting to be an award was made: the disputed fact is, whether the arbitrators refused wrongfully to hear any evidence on the part of the complainant. And a point of law arises, whether, if that be so, the instrument was an award.

As to the fact: the affidavits on behalf of the complainant contain sufficient to show that the justices may have been well warranted in considering it proved. And we presume that they were right, as this is not an appeal from them.

Then the point arises: did this fact warrant the statement contained in the order? In other words, does the order correctly state the legal effect of the fact? Stat. 10 G. 4, c. 56, s. 27, enacts that an award made according to the true purport and meaning of the rules of the Society shall be final and binding. The rule of the Society in question, relating to arbitrators, declares that the arbitrators shall hear evidence on both sides, and their decision binding to all parties shall be final. Upon this statement there is good reason for saying that arbitrators who refused to hear the evidence of one side did not make an award accord-

ing to the true meaning of the rules of the Society, and therefore did not make an award final and binding *within the terms and intention of stat. 10 G. 4, c. 56, s. 27. Stat. 4 & 5 W. 4, c. 40, s. 7, giving jurisdiction to the justices in case of the neglect or refusal of the arbitrators to make an award, recites stat. 10 G. 4, c. 56, s. 27, and intends an award final and binding within the meaning of that statute. It seems to follow that the justices have jurisdiction where the award is not in this sense final and binding. And we have, therefore, come to the conclusion that they had jurisdiction in the case now before us.

Another question was, whether the justices for the county had jurisdiction, it being alleged that the matter in difference arose entirely within the jurisdiction of the borough of Leeds. But, although the meetings of the Society are at Leeds, and the expulsion took place there, it appears that the Society is not locally confined to the borough: members may reside out of the borough: and the act which led to the expulsion took place out of the borough; and the nature of that act was really the matter in difference. Therefore the question must be answered in the affirmative, the matter in difference not having arisen entirely within the borough of Leeds.

And the rule for quashing the order of justices must be discharged.

Rule discharged.

55] *BRIDGET RYAN v. CLARK and CANHAM.

Declaration in trespass quare clausum fregit: plea, freehold in defendant: Replication, that defendant, before the time when, &c., demised to R. for a term, and R., before the time when, &c., entered and became possessed, and the term continued till the time when, &c.
On demurrer, replication held good.

TRESPASS for breaking and entering the dwelling-house of plaintiff, making noise and disturbance therein, &c.

The defendant Clark separately pleaded (fourthly), that the dwelling-house in which, &c., at the said several times when, &c., was and now is, the dwelling-house, soil, and freehold of the now pleading defendant; wherefore he, the now pleading defendant, in his own right," &c. (justification).

Replication. That, whilst the said dwelling-house in which, &c., was the dwelling-house, soil, and freehold of defendant Clark, and before any of the said times when, &c., to wit, on, &c., defendant Clark demised the said dwelling-house in which, &c., to Dennis Ryan, to hold the same to the said D. Ryan and his assigns, for a certain term, to wit, for one year from the day and year last aforesaid, and so on from year to year, &c.; And the said D. Ryan, afterwards, and before any of the said times when, &c., to wit, on, &c., entered into the said dwelling-

house in which, &c., and became and was possessed thereof for the said term so to him thereof granted; and the same term continued and subsisted until the defendant John Clark afterwards, and during the continuance of the said term, to wit, at the said several times, when, &c., of his own wrong broke and entered the said dwelling-house in which, &c., and committed therein the several trespasses, &c.

General demurrer. Joinder.

*The case was argued in last Easter term.(a)

[*66

G. Hayes, for the defendant.—The plaintiff admits on the record that he has no right of action; for title is shown in a third party, who has entered. It is true that the replication shows the defendant to be out of possession; but that does not make him a wrongdoer as against a mere wrongdoer; and the plaintiff, if in possession at all, is no more. [PATTESON, J., mentioned *Newlands v. Holmes*, 3 Q. B. 679 (E. C. L. R. vol. 43).(b)] The plea of *liberum tenementum* is still a good answer to a declaration in trespass *quare clausum fregit*; *Harvey v. Bridges*, 1 Exch. 261.† In that case the Court of Exchequer Chamber sustained the judgment of the Court of Exchequer in *Harvey v. Brydges*, 14 M. & W. 427,† where PARKE, B., said that the original object of the plea was to drive the plaintiff to prove his title to the disputed close. Here the plaintiff meets the plea, not by title in himself, but by title in a third party. [PATTESON, J.—*Fenner v. Fisher*, Cro. Eliz. 288, S. C. Poph. 1, referred to in the Court of Queen's Bench in *Holmes v. Newlands*, 11 A. & E. 44 (E. C. L. R. vol. 39), shows that where the defendant sets up a title the plaintiff may traverse it without showing title in himself. Now there the title set up by the defendant was freehold in a stranger and demise to himself, and the traverse was of the demise; so that the title of the stranger was admitted.] That was not a plea of *liberum tenementum*. [PATTESON, J.—I think the principle of that case touches the present question.] If the plaintiff there had wished to derive title to himself from the alleged freehold, he could have done so only by giving express colour to the *defendant; and the pleadings might have been endless. But here he himself sets [*67 up the title of the third party, and may at once derive title to himself by way of confessing and avoiding the plea. In *Lambert v. Stroother*, Willes, 218, 225, WILLES, C. J., points out that the plea of *liberum tenementum* may be answered by a direct traverse, or by showing a title derived to plaintiff from defendant's freehold, or, thirdly, by showing specially a title neither inconsistent with nor derived from that of the defendant, as by a lease to plaintiff prior to the acquisition of the freehold by the defendant. But here the reply is of title in a third person derived from the defendant's freehold. In *Thompson v. Har-*

(a) April 27th, 1849. Before PATTESON, COLERIDGE, and ERLE, Js.

(b) In Exch. Ch., affirming the judgment of Q. B. in *Holmes v. Newlands*, 11 A. & E. 44 (E. C. L. R. vol. 39).

dinge, 1 Com. B. 940 (E. C. L. R. vol. 50), it appeared, on the evidence, that the plaintiff had a customary freehold interest and the defendant the freehold tenure; and the Court held that the plaintiff's interest was subordinate to that of the defendant, "and must be replied, on the same principle on which a term of years must be pleaded in answer to the plea of *liberum tenementum*." At one time it was doubted whether even a term derived to the plaintiff from the defendant could be replied to a plea of *liberum tenementum*: but in Yearb. Hil. 5 H. 7, pl. 2, fol. 10 A, it was decided that such a replication was good, inasmuch as the complaint was of an injury to the possession. But, on these pleadings, when they are all put together, the plaintiff appears to be without right of possession. There is no precedent of such a replication as the present; nothing of the sort is suggested in Com. Dig. *Pleader* (3 M 34). It may be observed that in *Fenner v. Fisher*, Cro. Eliz. 288, the *68] defendant was a *mere wrongdoer; the only title which he alleged in himself was traversed; on this record the defendant has a good title against all but his lessee and those claiming under the lessee. If the plaintiff had claimed title under the lessee, that title would have been traversable, according to the principle of *Chambers v. Donaldson*, 11 East, 65. [COLERIDGE, J.—That case is explained in the judgment in *Dobree v. Napier*, 2 New Ca. 781, 798: where a defendant justifies under the command of another having title the command is traversable, because "non constat that the party entitled would have ever insisted on his right, and there can be no reason, if he thinks proper to waive it, why a stranger should justify himself in standing in his place."] That is the correct principle: and the plaintiff here is putting himself in the lessee's place without authority: the lessee might never have complained of the defendant's trespass. The pleading in the case of *liberum tenementum* is anomalous: but to allow a plaintiff to insist on a wrongful possession as against a freeholder would be a fresh anomaly. If a tenant for years be ousted, the reversioner may enter to make claim, though not to take profits; Co. Lit. 250 b; which shows that a freeholder, even where he is not entitled absolutely to the immediate possession, may still exercise a possessory right against a mere wrongdoer. [ERLE, J.—You assume the plaintiff to be a wrongdoer: according to your view a freeholder who had leased might always make the party in possession show the title from the lessee.] He might; and in that there is no hardship. Possession is not a good title as against the freeholder. [PATTESON, J.—For the plaintiff it will be said that the *69] defendant is *shown to be a wrongdoer if the term be out of him.] But the question is as to the plaintiff's right to complain. The replication should fortify the declaration; but here it is in the nature of a departure.

Metcalfe, contra.—The effect of the pleading is this. The defendant justifies the trespass as being a freeholder: the replication shows that,

though a freeholder, he is only a reversioner. According to the language of this Court in *Doe v. Wright*, 10 A. & E. 763, 781 (E. C. L. R. vol. 37), the plea of *liberum tenementum* "must admit a possession in the plaintiff, or it would be bad, as amounting to the general issue. It must admit such a possession as would suffice to maintain the action if unanswered, or as against a wrongdoer. On the other hand, it must deny a rightful possession, or it would fail as a defence to the action. In the language of pleading, it gives implied colour to the plaintiff, but asserts a freehold in the defendant with a right to immediate possession." That assertion is therefore met by whatever shows that the defendant has not a freehold with the right of immediate possession. [PATTERSON, J.—You say that you make the defendant a wrongdoer by showing that he is so against either plaintiff or a third person. COLERIDGE, J.—And a third person in possession.] The third person is not here admitted to have been in possession at the time of the trespass: but, even if he were, it is enough for the plaintiff to show that the defendant's answer fails. There is nothing in *Thompson v. Hardinge* inconsistent with this: the question there was between the right of the plaintiff and that of the defendant, each *claiming the freehold for himself. The reversioner, who has leased, has no right to enter, though for the purpose of repairing; *Barker v. Barker*, 3 C. & P. 557 (E. C. L. R. vol. 14). Even if the replication here had contained an averment that the lessee had demised to the plaintiff, that averment would not be traversable, because the defendant would still show no right of entry. [COLERIDGE, J.—But you allege that the lessee entered and the term still remained.] That is consistent with a sub-lease to the plaintiff. [ERLE, J.—An allegation of such a sub-lease would not have been an inconsistency; and that is an argument against holding the replication, as it now stands, a departure.] It is no departure, as appears from *Wharton v. Naylor*, 12 Q. B. 673, 677 (E. C. L. R. vol. 64). Title is not necessary to the plaintiff in trespass; possession is enough; *Whittington v. Boxall*, 5 Q. B. 139 (E. C. L. R. vol. 48). (a)

G. Hayes, in reply.—In *Doe v. Wright*, 10 A. & E. 781 (E. C. L. R. vol. 37), the Court clearly considered that the proper replication to the plea of *liberum tenementum* was such a replication as set up a right of the plaintiff.

Cur. adv. vult.

PATTERSON, J., in this vacation (June 21st), delivered the judgment of the Court.

The question is, whether a replication of an outstanding term in a stranger, the plaintiff not tracing title through him, is an answer to a plea of soil and freehold in the defendant to a declaration *quare clausum fregit*. And our answer is in the affirmative.

*The declaration alleges that the defendant trespassed on the plaintiff's close. It is clear that the allegation of possession here- [*71

(a) See *Jones v. Chapman*, 2 Exch. 803.†

in implied is maintained, not only by a possession rightful against all the world, but also by bare possession not standing on indefeasible title, unless the defendant has a right to the possession. It is probably conceded that a plea of soil and freehold, though held valid on account of long usage, is bad in reasoning; because the defendant may be a trespasser, although he be the freeholder. The history of the anomaly is given in *Lambert v. Stroother*, Willes, 218: and the construction which must be put on the plea, to make it a consistent defence, is correctly given in *Doe v. Wright*: viz., it admits such a possession as would maintain the action against a wrongdoer, but asserts a freehold in the defendant with a right to the immediate possession. This view of the plea, as to its anomalous nature and the proper construction of it, is confirmed in *Roberts v. Taylor*, 1 Com. B. 117 (E. C. L. R. vol. 50): and the Court then, wisely, as we think, prevented the extension of the anomaly to any form of trespass beyond that in which the usage had prevailed. This being the effect of the plea, the present replication confesses the freehold, and avoids the presumptive right to the possession, which, by the above construction, is involved therein, by alleging an outstanding term in a stranger. The plea, admitting that the plaintiff had a sufficient possession against all but the person having right to the possession, alleged that right in the defendant as an inference from the freehold *72] being in him: the replication negatives that right, and shows him to *be a wrongdoer, against whom the admitted actual possession of the plaintiff is sufficient for the maintenance of the action. The replication does not in terms allege actual possession in the stranger; but it merely states the grant of a term and the entry of the termor in the usual mode of pleading a subsisting term. Even according to the strict technical rules of pleading, this replication is sufficient. It is clearly laid down in *Holmes v. Newlands*, 11 A. & E. 44 (E. C. L. R. vol. 39), citing various cases, and especially *Fenner v. Fisher*, Cro. Eliz. 288, S. C. Poph. 1, that, where *express* colour is given in a plea, it is sufficient in the replication to deny the title of the defendant without tracing the title of the plaintiff; and there is no sound distinction in this respect between express colour and implied colour, which is certainly given by the plea of *liberum tenementum*. Further, it may be observed that, if the replication in this case had gone on to aver that, after Dennis Ryan became so possessed, and during the continuance of the said term, the plaintiff entered into the said dwelling-house in which, &c., and became and was possessed thereof, until the defendant afterwards, and during the continuance of the said term, at the several times when, &c., of his own wrong broke and entered, &c., this would have been good without showing any derivative title from Dennis Ryan to the plaintiff, because it would have asserted again the actual possession of the plaintiff, and the other part of the replication would have shown that the defendant had not the right of possession, and was there-

fore a wrongdoer. But it surely cannot be necessary in the replication to reassert such possession in the plaintiff, which had been already [*73 asserted by the declaration, and confessed by the defendant's plea.

If, indeed, the replication, as framed, must be taken to aver implicitly that Dennis Ryan was in possession at the time of the alleged trespass by the defendant, then it would be bad, because it would be inconsistent with and would contradict the assertion in the declaration, that the plaintiff was at those times in possession. Now, the averment in the replication of the entry of Dennis Ryan was itself unnecessary, because it is distinctly laid down, in *Williams v. Bosanquet*, 1 B. & B. 238 (E. C. L. R. vol. 5), that entry is not necessary to the vesting of a term of years in the lessee; the interest and legal right of possession, where the term is to commence immediately and not in future, vests in the lessee before entry; and of course the right of possession in the lessor is gone, though, for the purpose of maintaining an action of trespass, the lessee must enter, since that action is founded on the actual possession. The averment, therefore, of the entry of Dennis Ryan, contained in the replication, being immaterial, cannot fairly be said to involve a continuing possession in him up to the time of the trespasses complained of. But, supposing the averment to be material, we believe that no authority can be found for the proposition that it involves an averment of the possession continuing in Dennis Ryan: and, as such latter averment would be contradictory, not only to the declaration of the plaintiff, but to the plea of the defendant, we do not think that we are called upon to put such a construction upon the replication for the first time, when a different construction will support [*74 the previous pleadings, and be consistent with the literal meaning of the language used in the replication.

For these reasons we are of opinion that judgment must be given for the plaintiff.

Judgment for plaintiff.

In trespass, when the plaintiff has shown his possession of the property, the defendant must show a better title in himself: *Townsend v. Kerns*, 2 Watts, 180. A person having the right of entry upon land is not liable in trespass *quare clausum fregit* for entering against the will of the person in possession: *Yeates v. Allin*, 2 Dana, 134; *Walton v. File*, 1 Dev. & Bat. 567. In trespass *quare clausum*, to a plea of *liberum tenementum*, the plaintiff must reply either by traversing the title set up, or, by ad-

mitting the source of the derivative title, state a title in himself paramount to that of the defendant: *Hyatt v. Wood*, 4 Johnson, 150. A replication merely of *de injuria* to a plea of *liberum tenementum* is bad: *Ibid*. A defendant cannot defend himself by showing an elder outstanding title, unless there is a privity between himself and the person holding such title: *Owings v. Gibson*, 2 Marshall, 515. A plea of freehold in a third party is bad: *Richardson v. Merrill*, 7 Missouri, 333.

The QUEEN v. MACHEN and BRICKDALE, Esqs.

Under stat. 7 & 8 Vict. c. 101, s. 2, a refusal by justices to make an order for maintenance of a bastard, though on the merits, is no bar to a second application. And, if justices refuse to entertain such second application on the mere ground of the first refusal, the Court will order them by mandamus to hear.

The justices, on a second hearing, may nevertheless take into consideration, with a view to forming their decision, the fact and circumstances of the former hearing.

MONTAGUE SMITH, in last Easter term, obtained a rule calling on Edward Machen and John Fortescue Brickdale, Esquires, justices of the peace for Gloucestershire, acting for the petty sessions division of Coleford in that county, and on William White, to show cause why a mandamus should not issue, commanding the justices to hear and adjudicate upon the application made to them, at the petty sessions held on 27th February last, on behalf of Hannah Jones, single woman, for an order upon White, the putative father of a bastard child, for maintenance of the said child, and to enter adjournments, &c.

From the affidavits in support of the rule it appeared that Hannah Jones had been delivered of a bastard on 29th November, 1848; that she took out a summons against White; which was heard, before the two justices named in the rule, on 30th January, 1849; and they then dismissed the case, considering her evidence not sufficiently corroborated. That she afterwards discovered material evidence in corroboration, and obtained a fresh summons, which was attended by herself and

*75] White's attorney on 27th February, 1849, before the *same justices. That White's attorney objected that the case had been already heard and dismissed; and the justices, after argument, refused to hear the case again. In answer, it was sworn, by one of the justices, and the clerk to the justices, that the first application had been dismissed on the merits, and that this was proved before the magistrates at the attendance on 27th February.

In last Easter term, (a)

Keating showed cause.—The question is, whether, when an application for an order of maintenance in bastardy has been made under stat. 7 & 8 Vict. c. 101, s. 2, heard on the merits, and refused, a second application can be made within the twelve months from the birth. Sect. 1 in effect repeals the provisions of stat. 4 & 5 W. 4, c. 76, as to orders in bastardy. Under that act, by sect. 72, the application could be made only at the quarter sessions next after the chargeability: but, by the later statute (sects. 2, 3, 4), the application is to be heard before justices at petty sessions, subject to an appeal to quarter sessions. If a second application may be made, there is no limit to the number of applications, except the twelve months within which application or a payment must have been made according to sect. 2. The legislature, by sect.

(a) May 3d, 1849. Before PATTISON, WIGHTMAN, and ERLE, Js.

3, requires that the mother should be corroborated, thus indicating a suspicion of her testimony; and this principle would be contravened by allowing repeated applications on fresh evidence after failure of the first evidence. The suggestion here is, that, the justices having considered the corroboration insufficient, fresh evidence has been found: [*76 *but it does not appear quite distinctly that this evidence was unknown to the applicant at the time of the first hearing. Nothing in the statute points to a second application: the order, by sect. 4, must be applied for in forty days after the service of the summons. In *Regina v. Robinson*, 6 D. & L. 295, a similar objection was taken at petty sessions, and, afterwards, on appeal to the quarter sessions; the quarter sessions confirmed the order of maintenance made by the petty sessions: and ERLE, J., refused to quash the order on certiorari. That was on the ground that the sessions had jurisdiction to inquire as to the fact of the discharge of the order on the original application, and, if they found in fact no discharge on the merits, might sustain the second application. It sufficiently appears here that the justices had evidence of the fact of the first application: indeed, as the justices were the same, they might act on their own knowledge. Now the learned Judge said, in the case cited, that "a former decision upon the merits in favour of the putative father was an answer to the application, provided it was made out by evidence." The proceeding is in the nature of a criminal proceeding. [COLERIDGE, J.—I do not see that that is essential to your argument: in civil proceedings a previous decision on the same fact may be insisted on.] In *Rex v. Tenant*, 2 Str. 716, S. C. 2 Ld. Raym. 1423, an order of maintenance made by two justices was quashed on appeal; and they afterwards made a second order: and this Court quashed the second order on certiorari. An Anonymous case in 1 Ventris, 59, is to the same effect. By stat. 7 & 8 Vict. *c. 101, [*77 the jurisdiction is replaced in the position in which it stood at the time of these decisions, before stat. 4 & 5 W. 4, c. 76.

Montague Smith, contra.—Stat. 4 & 5 W. 4, c. 76, in effect limited the party to one application: had the legislature intended to continue that limitation, there would have been some provision for the purpose. The reason for not inserting any such limitation probably was, that the mother has no appeal from the petty sessions, in case of an adverse decision, as the alleged father has. [PATTESON, J.—In this very case, if we refuse the mandamus, you cannot apply again.] That is merely a practice established by the Court for the general exercise of its discretion: it suggests no analogy as to the petty sessions' practice in bastardy questions. The refusal of the justice to make the order is in the nature of a nonsuit rather than of a judgment. The order, when made, belongs technically to the class of "orders," not to that of convictions; Paley on Convictions, 131 (3d ed.). If an order of removal be refused, a second application may be made. [WIGHTMAN, J.—That is an ex parte

proceeding.] Strictly it is so: yet it is not unusual to hear both parishes; and, at any rate, the party who applies for such an order a second time has already been heard. It is only to criminal proceedings that the principle of a plea of *auterfois acquit* applies: and, even if this were in the nature of a criminal proceeding, the principle cannot be applied where there is no record; it prevailed in *Rex v. Reason*, 6 T. R. 375, *78] because there the acquittal was in the nature of a record. The *practice which it is now sought to establish would frequently make it necessary to decide, upon oral evidence, whether the first refusal was upon the merits or not; though, it is true, no difficulty on that point exists in this particular case. [ERLE, J.—It will be said, on the other side, that if the dismissal in any case can be a stop to a future proceeding, the decision of the magistrates here must be taken as showing that such was the case before them. The rule upon which I act, on hearing a summons at chambers, is that, where a summons is endorsed “no order,” the party may come again; but, where the endorsement is “application dismissed,” that is a judgment which the applicant must move to rescind.] That shows the necessity of a written decision, to raise the point at all. If the refusal had been considered a judgment, the legislature would have given an appeal. [ERLE, J.—By sect. 4, the justices may adjourn, supposing the evidence merely insufficient. This appears to be nugatory, if a party may go on with fresh applications. After that comes the limitation of forty days from the summons.] That is no more than any limitation which the practice of the Courts imposes as to taking steps in a proceeding once commenced, as in ejectment: where, nevertheless, a defeated party may sue again. A question partly involving the present point is now pending before the Court for Crown cases reserved; *Regina v. Brisby*.(a) In *Rex v. Tenant*, 2 Str. 716, S. C. 2 Ld. Raym. 1423, the quashing, which was held conclusive, was by the quarter sessions: this is pointed out by Lord *79] HARDWICKE in *Rex v. Jenkin*, Ca. K. B. temp. Hard. 301, where *it was held that two justices in petty sessions could not make an order discharging the alleged putative father, but could only refuse the application; and that such discharge was no bar to a second application. The Anonymous case in 1 Ventris, 59, was also a case where the order had been quashed by sessions: and, besides, the value of the decision is very questionable: according to the report, the Court said that, if a father could not be found, the justices who made the discharged order must maintain the bastard. *Cur. adv. vult.*

Lord DENMAN, C.J., in this vacation (July 11th), delivered the judgment of the Court.

The question in this case is, whether a second application in bastardy can be made by the mother, under stat. 7 & 8 Vict. c. 101, after justices in petty sessions have dismissed the first.

(a) Since decided; 1 Den. C. C. 416.

The case of *Rex v. Jenkin*, Ca. K. B. temp. Hard. 301, determined that justices out of sessions have no power to adjudicate that the man against whom the complaint is made is not the father, and to acquit him expressly on the ground that, as no appeal was given to the parish, they ought not to be concluded. So, here, no appeal is given to the mother, though it is given to the party charged: and therefore, if we were to hold that no second application could be made, the parties would be placed on unequal terms.

The cases cited at the bar were all cited in *Rex v. Jenkin*: and the Court took the distinction between the decision of a Court of sessions, which is final, and a mere dismissal of an application by justices out of *sessions. They also noticed the alleged inconvenience of repeated [*80 applications, and said that it was no greater than in other cases, such as applications for orders of settlement, or for suppressing ale-houses, and the like, in which there is no doubt that a second application may be made.

The statute 7 & 8 Vict. c. 101, gives the mother the remedy, somewhat similar to that which formerly had been given to the parish, and directs the tribunal to which application is to be made. It authorizes the justices in petty sessions, upon certain evidence, to adjudge the party summoned to be the putative father, and to order him to pay money, and gives him a right of appeal: but it contains no direction as to what is to be done if the case is not made out to their satisfaction. Neither does the subsequent statute 8 & 9 Vict. c. 10; which latter gives in a schedule the forms which are to be used; but there is no form of adjudication in favour of the party summoned, nor any enactment as to costs to him, or anything of the kind. We cannot, therefore, see that the legislature intended them to have any power to adjudicate finally against the mother. Their dismissal of the application is rather in the nature of a nonsuit in an action; in which case the plaintiff may come again better prepared.

We are far from saying that the dismissal is to have no weight: but we think that the justices cannot refuse to hear the second application. If it should appear to them that the matter was fully inquired into on the first occasion, they will reasonably view any new evidence with much suspicion, and sift it accordingly: but we do not think that the dismissal can operate as a bar to further inquiry.

Rule absolute.

***81]** *DOE, on the several demises of The QUEEN and GEORGE FINCH, v. The Archbishop of YORK, the Earl of DEVON, and JOHN LOCH.

B. was empowered by acts of parliament to make a canal; and he was authorized thereby to supply the canal from brooks within five hundred yards thereof, to dig and trench the adjacent land, and remove earth, trees, and other obstructions thereon, for making, using, and maintaining the canal and towing paths, and making, &c., trenches and watercourses, with similar powers as to roads and other conveniences connected with the canal; to enclose and appropriate such parts of the lands as should be proper for wharfs or quays; to set up, &c., posts, ditches, and fences, in places necessary for separating the towing paths from the adjacent lands; to lay earth and other materials requisite for the works; and do and perform all things necessary for the making, maintaining, and convenient use of the canal. It was provided that nothing should authorize B. to use the lands for any other purpose than that of the navigation. Provisions were made for the purchase and sale of such lands as should be wanted, for assessing the price and the damages to be paid by B. for the use of or injury to the lands: and, if he should be in possession of any lands for a certain space of time without using them for the canal, he was to reconvey his right and interest therein: and it was provided that the works and things made in forming a certain part of the canal should become the property of B.

Held, that no right to the soil of the lands, adjoining to the canal, and applied to the purposes thereof under the powers of the act (not being those comprehended under the last-mentioned proviso), passed to B. where there had been no actual purchase.

Certain of the said adjoining lands were the property of the Crown, in right of the Duchy of Lancaster; and such lands cannot be parted with by the Crown except under certain statutory regulations imposed by 1 stat. 1 Ann. c. 7, s. 5. The canal acts in question are later. The clauses authorizing the user of the lands, and providing for compensation for such user, mentioned the Crown, either expressly or by direct reference: the clauses confined to authorizing the purchase and providing for the assessment of the price mentioned only bodies politic, corporate, &c., parties having especial interest as guardians, trustees, executors, &c., and "all and every other person and persons whomsoever." Contracts of purchase were to be enrolled with the clerk of the peace. On payment or tender of the purchase-money, the lands purchased were to vest in B. Held, that the Crown had no power to convey lands under these clauses; and that, supposing such power to exist, no purchase could be inferred from the exercise by B. of the powers of entry and user given by the act; especially as no evidence of an enrolment was produced.

Conceded, that, upon the above construction of the statute, there could be no adverse possession by B. using the Crown land under the powers given by the acts:

And, therefore, that B. having within the time of limitation begun to occupy part of the Crown lands for purposes not connected with the canal, ejectment lay, on the demise of a lessee of the Crown, for lands so occupied, whether they had or had not been also used for the purposes of the canal under the statutory powers. But that possession was not to be given to the lessor of the plaintiff in such a manner as to interfere with B.'s easement.

EJECTMENT for messuages and hereditaments in the parish of Run-corn, in Cheshire.

The declaration contained two demises, both dated 26th March, 1844: the first in the name of Her present *Majesty in right of her
***82]** Duchy and County Palatine of Lancaster; the second in the name of George Finch. The cause was tried at the Spring Assizes for Cheshire, 1845, before WILLIAMS, J.; when a verdict was found for the plaintiff on the second demise, and for the defendants on the first.

At the trial, several points of law were raised by the defendant's counsel, upon which a rule was granted, (a) in the following Easter term,

(a) On the motion of *Servis* for the defendants.

calling upon the lessors of the plaintiff to show cause why the verdict on the second demise should not be set aside, and a verdict entered for the defendants, or why there should not be a new trial. This rule was in part argued: but it was afterwards agreed that the facts raising the points of law should be stated for the opinion of the Court. The case was stated substantially as follows.

This action was brought to recover possession of a small portion of land in the parish of Runcorn, on part whereof certain limekilns have been built, lying between a road (described in the case) and a pool of water there called the Big Pool, communicating with the canal called the Duke of Bridgewater's Canal, and also to recover a portion of land covered with the water of the said Pool, and adjoining to the portion of land first mentioned. (A plan was annexed.) It is to be taken, for the purposes of this case, that both the said portions of land are parcel of the manor of Halton, in the parish of Runcorn. Her Majesty, in right of her Duchy and County Palatine of Lancaster, is lady of the said manor of Halton. The defendants are the devisees in trust appointed and acting under the will *of Francis late Duke of Bridgewater: and it is to be taken, for the purposes of this case, [*83 that all the estates, right, title, and interest (if any) which, by the acts of parliament hereinafter mentioned, or any of them, were vested in the said late Duke, are now vested in the defendants, as his devisees in trust. The lessor of the plaintiff, George Finch, is the surviving lessee of Her Majesty of the said manor of Halton, with its rights, members, and appurtenances, under a lease thereof dated 23d December, 1830, for the term of thirty-one years from 26th November, 1828. It was proved at the trial that the said manor of Halton, with its rights, members, and appurtenances, had been in lease from Her Majesty's royal predecessors to various persons continually since the year 1728.

No part of the said Duke of Bridgewater's Canal, nor of the land covered with the water thereof, nor of its banks, is claimed in the present action: but the part of the canal which, as before mentioned, communicates with the Big Pool, and which is adjacent to the land claimed in this action, was made by the said late Duke of Bridgewater under the powers vested in him by stat. 6 G. 3, c. 96. Previously to the passing of that statute, certain acts of parliament had passed, authorizing the Duke to make a canal in the County Palatine of Lancaster, namely, stat. 32 G. 2, c. 2 (private), and 33 G. 2, c. 2 (private). And stat. 2 G. 3, c. 11 (private), after reciting the two earlier statutes, authorizes the extension of the canal from or near Longford Bridge in Lancashire, over the river Mersey, and through certain places in Cheshire, to or near the Hempstones in the said township of Halton in Cheshire. The part of the canal communicating with the Big Pool,

*84] *and adjacent to the land claimed in this action, was not made or authorized to be made under this last-mentioned act.

The case then set out the following clauses of stat. 6 G. 3, c. 96.

By sect. 84, reciting the three earlier acts already mentioned, the Duke of Bridgewater, his heirs and assigns, "are authorized, empowered, and required" "from time to time and at all times hereafter, at his and their own proper costs and charges, by the ways and means, and by and under the like provisions, powers, and authorities in all respects, as are authorized, made, or directed in all or any of the said recited acts, to make, extend, complete, and maintain the said navigable cut or canal so begun, and now carrying on by him as aforesaid, passable for boats," &c., "to that part," &c. (describing the line of the canal), "as fully, completely, and effectually, to all intents and purposes, as if the course of the said navigation had been so described, and the said termination thereof fixed, by" the recited act 2 G. 3, c. 11.

Sect. 85 provides and enacts: "that nothing in this act or in the said recited acts" "contained, shall extend" "to authorize or empower the said Francis Duke of Bridgewater, his heirs or assigns, to make use of, convert, or employ any of the lands or grounds which shall be set out or ascertained for the making of so much of the said cut or canal" "as is herein directed and authorized to be made by the said" Duke, "his heirs and assigns, or for the towing paths, wharfs, quays, trenches, sluices, passages, or other works or conveniences hereby authorized to be made by the said" Duke, "his heirs or assigns, to or for any other use or purpose whatsoever, save only to or for the uses and purposes of the said navigation; anything herein contained to the contrary notwithstanding."(a)

*85] *The following clauses of stat. 32 G. 2, c. 2, were then set out.

By sect. 1, the Duke is authorized and empowered to supply the cut or canal therein mentioned with water from such "brooks, streams, and watercourses as are or shall be found within the distance of five hundred yards from any part of the said cut or canal, and to continue and use the said navigation in such manner as he and they shall think fit; and for that purpose he and they, and his and their agents, servants," &c., are "authorized and empowered, in, upon, or through the lands and grounds of *the King's Majesty, his heirs or successors, or of any other person or persons, bodies politic, corporate, or collegiate, corporations aggregate or sole*, to dig, cut, trench, sough, and remove earth, stone, rubbish, trees, roots of trees, and all other obstructions, for the making, using, maintaining, and repairing the said cut or canal, and towing paths on the sides thereof, and for the making, using, maintaining, and repairing of such trenches, passages, gutters, and watercourses, as shall be necessary and proper to convey such water as aforesaid to and from the said cut or canal, and for the raising, strengthening, and supporting the banks of such cut or canal and towing paths, and such trenches," &c., "respectively, and for the making of weirs," &c.,

(a) The 95th section of the same act was also referred to in the argument. It enacts that, if the Duke of Bridgewater, his heirs or assigns, "shall respectively be in possession of any lands or grounds by virtue of this act for the space of ten years, without making the said intended navigation through the same respectively, or if the said navigation shall be made and completed, and afterwards discontinued or disused for the space of five years, then and in either of the said cases, from and immediately after the expiration of the said ten years without making, or five years after disusing the said navigation as aforesaid," the Duke of Bridgewater, his heirs or assigns, "shall respectively convey all their right, property, and interest in or to such lands or grounds respectively unto the several and respective persons, or bodies politic, corporate, or collegiate, or their heirs, successors, or assigns, who were the owners or proprietors thereof immediately before" the Duke, &c., "respectively, became seised of the same, in case they or any of them shall think fit to become purchasers," &c. (provisions are then made as to the terms of reconveyance).

"for discharging the water from the said cut or canal, and for making of such back drains, gutters, or trenches as shall be necessary or proper" to prevent damage to the lands adjoining or near to the canal by the oozing or flowing of water therefrom, "and for the making, maintaining, enlarging, opening, or altering any roads, ways, passages, cuts, locks, trenches, sluices, or other conveniences, to or from the said cut or canal, for the conveying, and also cranes, weighing beams, and other engines, for the loading or unloading of coals and other goods to and from the same; and to enclose and appropriate such parts of the said lands and grounds adjoining to the said cut or canal as shall be proper for wharfs or quays; and to make, maintain, repair, and alter any bridges, arches, or passages, over, under, or through the said cut or canal, or the said trenches, passages, gutters, watercourses, and sluices respectively, which shall communicate therewith; and to make and set up such posts, rails, hedges, ditches, banks, and other fences on the sides thereof, in such places as shall be judged *necessary for separating and dividing the towing paths from the adjoining [86 lands; and also to place and lay any earth, stone, materials, or things necessary to be got or used in or upon account of the several matters and works aforesaid, on the lands or grounds near to the place or places where such works or any of them shall be making, erecting, altering, or repairing; and to do and perform all such other matters and things necessary or proper for the making, maintaining, and easy and convenient use of such cut or canal, as he the said Francis Duke of Bridgewater, his heirs or assigns, shall think fit; he the said Francis," &c., "his heirs and assigns, his or their agents," &c., "first making satisfaction in manner hereinafter mentioned to the respective owners of and persons interested in such lands or grounds as shall be used, removed, or prejudiced in or by the execution of any of the powers hereby granted."

Sect. 3 enacts: "That it shall and may be lawful to and for the agents or servants of the said Francis," &c., "from time to time," &c., "to enter upon the lands or grounds of the said several persons, bodies politic, corporate, or collegiate, through which the said cut or canal is intended to be made, in order to survey and take a level of the same, and to set out and ascertain such parts thereof as they shall think necessary or proper for the making such navigable cut or canal, and other the matters and conveniences aforesaid, such agents or servants making satisfaction for the damage they shall do thereby to the occupiers of such lands or grounds for the time being, in case the same exceeds the sum of 1s."

Sect. 4 enacts: "That after any such parts of the said lands or grounds shall be so set out and ascertained for making the said cut or canal, and other the purposes and conveniences hereinbefore mentioned, it shall and may be lawful for all bodies politic, corporate, or collegiate, corporations aggregate or sole, husbands, guardians, trustees, and feoffees in trust, committees, executors, administrators, and all other trustees whatsoever, not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of their cestui que trusts, whether infants or issue unborn, lunatics, idiots, femmes covert, or other person or persons, and to and for all femmes covert who are or shall be seised or interested in their own right, and to and for all and every other person and persons whomsoever, who are or shall be seised, possessed of, or interested in any lands or grounds which shall be so set out and ascertained as aforesaid, or any part thereof, to contract for, sell, and convey unto the said Francis," &c. "his heirs and assigns, or to such person or persons as he or they shall nominate, all or any part of such lands or grounds which shall from time to time be so set out and ascertained as aforesaid; and that all such contracts, agreements, sales, conveyances, and assurances shall be valid and effectual in law to all intents and purposes whatsoever, any law," &c., "to the contrary thereof in anywise notwithstanding; and all bodies politic, corporate, or collegiate, and all persons whatsoever, so conveying as aforesaid, are hereby indemnified for what he, she, they, or any *of them shall respectively do by virtue and in pursuance of this act; and that [87 all such contracts, agreements," &c., "so as to be made as aforesaid, shall, at

the expense of the said Francis Duke of Bridgewater, his heirs or assigns, be enrolled by the clerk of the peace for the said county of Lancaster, and true copies thereof shall be allowed to be good evidence in all Courts whatsoever."

Sect. 6 appoints certain commissioners "for the settling, determining, and adjusting all questions, matters, and differences which shall or may arise between the said Francis," &c., "and the several proprietors of and persons interested in any lands or grounds that shall or may be affected or prejudiced by the execution of any of the powers hereby granted;" empowering them by writing under their hands and seals, with the consent of the parties concerned, to determine and adjust what sum or sums of money shall be paid by the said Francis," &c., "his heirs or assigns, to such bodies politic, corporate, or collegiate, person or persons respectively, who shall be so entitled or interested as aforesaid, for the absolute purchase of the lands or grounds which shall be set out and ascertained as aforesaid, for making the said cut or canal, or any part thereof, and other the purposes herein mentioned, and also to determine and adjust the recompense to be made for any damages which may or shall be at any time or times whatsoever sustained by any proprietors of or person or persons interested in any lands, grounds, tenements, or hereditaments, for or by reason of the making, repairing," &c., of the canal, trenches, &c., roads, ways, or sluices, or supplying the same with water, or by the flowing, leaking, or oozing of the water over or through the banks of the canal, trenches, &c., or over or through any passages, &c., which shall be made pursuant to the powers hereby given for conveying water to or from the canal, "or by reason or means of the execution of any of the powers herein contained, by the said Francis," &c., "his heirs or assigns, his or their agents, servants, or workmen, in case such price or value, damages and recompense respectively, cannot be settled, adjusted, and agreed for by and between the said Francis," &c., "and such proprietors of and persons interested in the said lands and grounds as aforesaid; and if the said Francis," &c., "or any such body politic, corporate, or collegiate, trustee or trustees, or other person or persons, so interested or entitled as aforesaid, shall refuse to submit any such matter to the determination of the said commissioners, or shall be dissatisfied with any determination which shall be by them made as aforesaid, and if any such body politic, corporate, or collegiate, trustee or trustees, or other person or persons entitled or interested as aforesaid, shall refuse to receive, upon due tender thereof made, such purchase-money or such recompense as shall be so determined to be paid, or shall, upon notice in writing," &c. (provisions as to notice), refuse to treat, not agree, &c.; provision is then made for a jury, which shall inquire of, assess, and ascertain the sum or sums of money to be paid for the *88] purchase of such lands or grounds, or *the recompense to be made for the damages that may or shall be so sustained as aforesaid; and the said commissioners or any seven or more of them shall give judgment for such purchase-moneys or recompense so to be assessed by such juries; which said verdict, and the judgment thereupon pronounced by the said commissioners or any seven or more of them, shall be binding and conclusive to all intents and purposes against the King's Majesty, his heirs and successors, and against all bodies politic, corporate, or collegiate, and all persons whomsoever."

Sect. 9 enacts: "That all the determinations of the said commissioners," "which shall be submitted to and acquiesced in by the parties concerned, and also the said verdicts and judgments, being first signed," &c. (direction as to signing by commissioners), "shall be transmitted, at the expense of the said Francis," &c., "to the clerk of the peace for the said county of Lancaster, and kept amongst the records of the quarter sessions of the peace for the said county," and be deemed records of the said quarter sessions, and the same or true copies thereof be allowed to be good evidence in all Courts, and all persons have liberty to inspect the same, and the enrolments, &c., paying, &c.; and to take copies, &c.

Sect. 11 enacts: "that upon payment of such sum or sums of money as shall be

contracted or agreed for between the parties, or determined and adjusted by the said commissioners," "or assessed by such juries, in manner respectively as aforesaid, for the purchase of any such lands or grounds as aforesaid, to the proprietors thereof or other persons entitled to receive such money respectively, or legal tender thereof made to such proprietor or proprietors or other person or persons, or to the principal officer or officers of any such body politic, corporate, or collegiate, or if he, she, or they cannot be found, or shall refuse to accept such money, upon payment thereof to such person or persons as the said commissioners" "shall by writing under their hands appoint, for the use of, and to be paid upon demand, without fee or reward, to such proprietors or persons respectively as aforesaid, then and in such case such lands and grounds respectively, and the fee simple and inheritance thereof, shall from thenceforth be vested in and become then for ever the sole property of the said Francis," &c., "his heirs and assigns, and used and enjoyed by him and them as his and their own proper estate and inheritance; and all bodies politic, corporate, and collegiate, corporations aggregate or sole, husbands, guardians, trustees, feoffees in trust, committees, and all other trustees, infants, lunatics, idiots, femmes covert, tenants in tail, and their heirs, successors, executors, and administrators, and all others claiming or to claim in possession, reversion, remainder, expectancy, or otherwise, any title to or interest in or upon such lands or grounds, shall be from thenceforth, to all intents and purposes whatsoever, divested of all right, title, claim, interest, or property of, in, to, or out of the same; and this act shall be sufficient to indemnify as well the said commissioners as the said Francis," &c., "his heirs and assigns, his and their agents, *servants, and workmen, for what they, any or either of them, shall do by virtue or in pursuance of the powers hereby granted."(a) [*89]

The case further stated that

The before-mentioned statute 33 G. 2, c. 2, by sect. 1, authorizes the Duke to supply the cut or canal therein mentioned (b) with water, in terms similar to those used in sect. 1 of stat. 32 G. 2, c. 2, except that, for the distance of five hundred yards, the distance of eight hundred yards is substituted; and that the power "to bore" is added to the power to dig, cut, &c.; and that "soughs, tunnels," are added to "trenches, passages," &c.; and that, to the words "convenient use of such cut or canal" are added the words "tunnels, soughs, trenches, passages, gutters, water-courses, and sluices."

Sect. 14 enacts: "that nothing herein contained shall extend to prejudice the rights of any lord or lords of any manor or manors, so that the exercising such rights do not prevent, hinder, or interrupt the making, using, maintaining, or keeping in repair the said navigable cut or canal, or the making, using, doing, or performing any work, matter, or thing by the said former act or in this present act authorized to be done or performed."(c)

(a) Sect. 23 was also referred to in argument; which enacts: "That upon the request of the said Francis Duke of Bridgewater, his heirs or assigns, his or their agent or agents authorized by him or them to make such request, or upon the application of the principal officer or officers of any body politic, corporate, or collegiate, or of any guardian, trustee, or any other person, on oath made before any justice of the peace for the said county of Lancaster by such head officer or officers, person, or trustee respectively, that any lands or grounds belonging to or rented or occupied by such body politic, corporate, or collegiate, or such person or trustee, hath sustained damage, setting forth and specifying where and by what means such damage hath been sustained, and that no recompense or satisfaction hath been agreed for, settled, or ascertained for the same," &c.; the commissioners are then enabled to summon a meeting for the settling of damages, &c.

(b) Namely a canal in Lancashire, not forming part of those authorized by any of the other statutes, nor adjacent to the lands which were the subject of the present action.

(c) In the argument, reference was made to sect. 2, which extends the powers and provisions

*The canal was completed upwards of seventy years ago. *90] About the same time the said Big Pool was formed by a dam, which constituted part of the works of the canal, and did not stand on any part of the land claimed in this action; which dam penned up the waters of a brook, or mill stream, flowing through a valley in which the same brook is situate, and so formed the Pool. And, since the completion of the canal, the bank of the said canal has held up the water of the said stream, and still continues to maintain the water of the Pool at its present height. This brook ran with its right bank adjoining to Halton Manor; and, for the purposes of this case only, the old course of the brook is to be considered as the boundary of the manor; and the portion of land lying on the right bank of the old course and now covered by the water of the Big Pool is a portion of the land claimed in the present action. At the first damming up of the brook, and for nearly thirty years after, the Big Pool was considerably larger than it now is: and, on the right bank thereof, it covered part of the land claimed in this action, besides the part now covered with water. Forty-three years before the trial, an opening was made from the Big Pool into the canal, by which the Big Pool now communicates, as aforesaid, with the canal; and since then the water of the Big Pool has been on a level with that of the canal. A part of the place whereon the said limekilns now stand was, *during all the time last aforesaid, a *91] water way paved with large stones called burr stones, over which the waste water of the Big Pool flowed into and fed the said canal.

About forty years before the trial, an underground sluice or culvert, which ran under part of the land in dispute, and by which the water of the Big Pool ran under the said canal, was lengthened. This sluice or culvert still exists. The water ran over the paved water way, when it could not escape by the culvert.

The limekilns were built by one John Tomkinson, about ten years before the trial, by the permission of the defendants: and he has ever since occupied the same, and a part of the land, as tenant from year to year to the defendants. Another part of the land was also within that time made into a garden; and the same has ever since been held by one Abel Woodfine, as tenant from year to year of the defendants. Until the building of the said limekilns, and the making of the said garden, the land claimed in this action was (except as hereinbefore mentioned) waste of the manor, and uncultivated. The portion of land

of stat. 32 G. 2, c. 2 (except as altered) to the works, &c., now authorized; and to sect. 7, which enacts: "That the said cut or canal, piers and arches, works, matters, and things hereby authorized to be made, erected, and built in and over the said river Irwell, at or adjoining to Barton Bridge aforesaid, and all the materials thereof, whilst the same shall be making, erecting, and building, and after the same shall be finished and completed, shall be and remain the property of and is and are hereby vested in the said Francis Duke of Bridgewater, his heirs and assigns."

claimed in this action now lying under the water of the Big Pool was also, until the formation of the Pool, waste of the manor and uncultivated.

The counsel for the plaintiff put in the above-mentioned acts of parliament, for the purpose of accounting for the user of the land by the Duke, and those representing him, to the extent and in the way proved; and contended that the soil did not pass by the acts of parliament or by anything that appeared to have been done under them: but that the Duke and those representing him had exercised only a statutory right of *user; and that the existence of such right negatived an adverse [*92 possession. And they insisted that the evidence showed only an user of part of the land for the purposes of the canal, and not an appropriation of any part.

The defendants offered no evidence.

The counsel for the defendants contended, at the trial:

First, that the land claimed in this action, or at all events the land (part thereof) whereon the said limekilns are built, having been taken and used for the purposes of the said canal, was thereby absolutely vested in the said late Duke of Bridgewater, and in the defendants as his devisees, by virtue of the said acts of parliament or some of them.

Secondly, that the lessors of the plaintiff were barred from recovering possession of the said land in this action, by reason of adverse possession thereof had by the said late Duke of Bridgewater, and by the defendants since his death, in the whole for a period of more than sixty years.

The counsel for the plaintiff agreed that a part of the land had been used as above for the purposes of the canal: and the learned Judge declined to leave to the jury the question, as to the said land or any part thereof, whether the same was taken for the purposes of the said canal: but he told the jury that the user of the land, as proved, was evidence from which they might, if they thought fit, infer that the Duke and those representing him had taken possession of the land; and that the plaintiff was not entitled to recover in respect of land which had been so taken possession of. The jury found for the plaintiff on the second demise.

*Copies of the acts of parliament accompanied the case, and [*93 were to be referred to and taken as part of the case.

The question for the opinion of the Court was: Whether the lessor of the plaintiff, George Finch, was entitled to recover in this action the whole or any part of the said land claimed therein.

If the Court should be of opinion that he was entitled to recover the whole thereof, the verdict found at the trial was to stand. If the Court should be of opinion that he was entitled to recover a part thereof, the verdict was to be entered for the plaintiff as to such part and for the defendants as to the residue. If the Court should be of opinion that

he was not entitled to recover any part thereof, a general verdict was to be entered for the defendants.

And it was also agreed that the Court should have power, if they should think fit, to order a new trial; or if they should think fit, to direct a special verdict with such facts as they should think established by the above statement.

The case was argued in last term.(a)

T. F. Ellis (Attorney-General for the Duchy of Lancaster), for the plaintiff.

First: if the land has not been purchased, the statutes give to the Duke of Bridgewater and those representing him no property in the soil, but only a privilege to perform certain acts on the soil. Not only is no more given by stat. 32 G. 2, c. 2, but that which is given is given *94] in words excluding the supposition of *a property in the soil passing. The powers are those ordinarily given, where canals are made under acts of parliament, over the land adjacent to the canal. So, in cases of railroads, rights of way and other privileges of user are given on adjacent lands without the soil passing. So far as the benefit to the canal is concerned, no purpose could be gained by granting the soil itself (which would also have the effect of granting all minerals), that would not be as effectually gained by a grant of the user. It would, on the other hand, be very inconvenient if the land in the neighbourhood, to the distance of 500 yards from the canal, were to be intersected with lines of property belonging to the canal proprietor, wherever a brook runs. Further, if it was meant to pass the soil, all the provisions enabling the canal proprietor to cut trenches, set up posts and rails, and the like, would have been absurd; the mere grant of the soil, which a few words would have effected directly, would have carried with it all such powers. The same inference arises from the additional powers conferred by stat. 33 G. 2, c. 2, s. 1. If a deed were made between the owner of land and another individual containing grants in these words, and the grantee, having used the powers, were sued in trespass by the grantor, it is obvious that the defence under the deed would be set up, not by a traverse of the plaintiff's possession or a plea of soil and freehold, but by a special plea justifying in the words of the deed. So it would be also in the case of a prescription. A fortio, nothing beyond the words used will be implied in construing an act of parliament; that principle was acted upon in *The Clarence Railway Company* *95] *v. The Great *North of England, &c., Railway Company*, 4 Q. B. 46 (E. C. L. R. vol. 45), where the Court refused to extend the language of the statute by implication, though without such implication it appeared impossible to carry the statute into effect. In *Stracey v. Nelson*, 12 M. & W. 535,† the Court of Exchequer actually transposed the words of a statute in order to prevent land passing where it was

(a) June 1st, 1849. Before Lord DEXMAN, C. J., PATTERSON, COLERIDGE, and ERLE, J.

inconsistent with the general purpose of the act that it should pass. Least of all can such an implication be made against the Crown: and the Queen, as to Her property in right of Her Duchy, has all the regal privileges. [This was assented to, on the other side.(a)] Indeed stat. 6 G. 3, c. 96, s. 85, expressly forbids the canal owner to use the lands which shall be set out, except for the purpose of the navigation; a provision quite inconsistent with his having the absolute property. [COLERIDGE, J.—If he had only the specific user, why add this restriction? May not the meaning be that he is to have the soil, but, if he does not use it in the particular way, must reconvey it under sect. 95 of stat. 6 G. 3, c. 96?] He is to reconvey, if he does not use it in the particular way, all of which he is in possession: but he does not possess what is the subject of mere user: it would be unnecessary to direct a reconveyance of that: mere abstinence from the user would be enough: and, besides, though he does use the trenches, &c., for the purpose of the navigation, in which case upon any construction he is not to reconvey them, yet he is forbidden to use them for anything besides. Sect. 85 is introduced *ex majori cautela*; and the particular use is allowed: then, as is not unusual in statutes of this kind, *any other use is [*96 expressly forbidden. When this case was first before the Court, PATTESON, J., inquired how, on the construction which the plaintiff contends for, the soil of the canal itself (which is not included in this action) could pass. But, if there be no ground for distinguishing the canal from the other land, there is no absurdity in supposing the canal owner to have merely an user for the bed of the canal. There can be no reason for passing the minerals to him. Many instances of grants of user to owners of navigation without the soil have come before the Courts.(b) In *Buckeridge v. Ingram*, 2 Ves. jun. 652, 663, an act of parliament conferred powers almost identical with those now in question on the corporation of the city of Bath, for the purpose of improving the navigation of the Avon: and Sir R. P. ARDEN, Master of the Rolls, though he held that dower was assignable out of the tolls, said: “this act cannot be construed to have taken out of the proprietors and given to this corporation the soil: but it has given them a right in and over the soil and certain real rights arising in and out of the soil.” *Doe dem. Hanley v. Wood*, 2 B. & Ald. 724, also shows how complete an user of land may be given without property in the soil.

Secondly: no purchase of the soil by the canal proprietors can be inferred. Supposing the argument on the first point correct, nothing has taken place beyond an user for which the statutory provisions account without the hypothesis of a purchase; and, moreover, by sect. 4 of stat. 32 G. 2, c. 2, all sales are to be enrolled with the clerk of the peace; and no such enrolment was shown. The inference of fact is

(a) See *Case of the Duchy of Lancaster*, Plowd. 212.

(b) See the cases collected in *Bruce v. Willis*, 11 A. & E. 463.

*97] therefore negatived. But, farther, the Crown had no power *to sell the land. The Crown is, by 1 stat. 1 Ann. c. 7, s. 5, restrained from selling the Duchy property except under certain regulations; and neither those regulations, nor other provisions since made enlarging the power of the Crown in this respect, apply here: so that the only question is, whether the canal acts themselves give the power. Now, sect. 1 of stat. 32 G. 2, c. 2, gives express power of digging, &c., "in, upon, or through the lands and grounds of the King's Majesty, his heirs or successors, or of any other person or persons, bodies politic, corporate, or collegiate, corporations aggregate or sole." In the same section it is provided that the Duke of Bridgewater shall make satisfaction in manner after mentioned "to the respective owners of and persons interested in *such* lands or grounds as shall be used, removed, or prejudiced in or by the execution of any of the powers hereby granted." "Owners" and "persons" here, by reference, include the Crown; and the power of entry, given by sect. 3, upon the lands "of *the said* several persons, bodies politic, corporate, or collegiate," will probably also apply to the Crown lands, the words "the said several persons" occurring in the corresponding place in the catalogue to that in which the King, his heirs, &c., had been named before. But, in sect. 4, the list of incapacitated parties empowered to sell neither names the King, nor substitutes in the place of the King any other term: it commences with "bodies politic," &c., using the word which in sect. 1 immediately followed the mention of the King. Long after, the words "to and for all and every other person and persons whomsoever" are introduced:

*98] but the word "person," neither by *ordinary usage, nor by any reference here (as in sects. 1, 3), includes the Crown: and the same is to be said of the same catalogue occurring lower down in sect. 4. Sect. 6 appoints commissioners to settle differences arising between the Duke "and the several proprietors of and persons interested in any lands or grounds that shall or may be affected or prejudiced by the execution of any of the powers hereby granted." The word "proprietors" would there include the King. But the language changes, and resorts to the restricted catalogue, when it is provided that the commissioners are to adjust the price to be paid for purchase "to such bodies politic, corporate, or collegiate, person or persons respectively" "entitled or interested as aforesaid." Again, in the same section, where damage is spoken of, the word "proprietors" is introduced; and the appeal to the jury is given in the case both of damage and purchase-money; and, accordingly, the verdict of the jury is declared binding "against the King's Majesty, his heirs and successors, and against all bodies politic, corporate, or collegiate, and all persons whomsoever." So, in sect. 11, which relates to purchase, the persons declared to be divested of right are "all bodies politic," &c., omitting the Crown. This variety of phrase is not accidental, but intentional. Whenever

power is given to the Crown by statute to part with land, the Crown is expressly named; and ordinarily special arrangements are made as to settling the price, the Crown not being subjected to compulsory sale.(a)

*Thirdly, there has been no adverse possession against the Queen. All the acts done, except the building and occupation of the limekilns within the last ten years, are such as the statutes authorize: and therefore, if the argument on the first point be correct, there has been only an user. [Sir *John Jervis*, Attorney-General, for the defendants.—That is so; and this point need not be argued. If the acts in question are acts only of user, the defendants cannot insist on an adverse possession: if they are acts of ownership, the statute which authorizes them gives the ownership, and the defendants do not want the third point. The question, therefore, comes back to the first point.] And, further, the acts, supposing them illegal, are not acts which could show an adverse possession. As to the trenching, the paving of the water way, and the forming of the culvert, those are transitory trespasses: the landowner, never having been ousted, could not enter; nor could he put out the trespasser, who was not on the land. He was not bound to assert his right by undoing the acts on the land. As to the Big Pool, all that the canal owners have done, if their act be illegal, is to create a nuisance on the land by an act done off the land, the building of the dam. The landowner, if he brought an action for this, must have sued in case, not trespass. [ERLE, J.—What shall be the description of act which puts the landowner out of possession must depend upon the state of the land. Was not it a question for the jury whether these acts, supposing them illegal, were assertions of possession?] If that be so, the plaintiff must succeed on this point, because the jury expressly negated that.

Fourthly, there was no misdirection. If the argument for the plaintiff on the first point be correct, the *Judge went farther in favour of the defendants than he ought to have gone; for, upon that view, there was no evidence of taking the land. But he did leave the question to them. The defendants must contend that he ought to have told them that the user was conclusively an act of taking the land.

Sir *John Jervis*, Attorney-General,(b) contra.—The defendants will not ask for a new trial on the ground of misdirection: if the Court sees now that the jury ought to have been told that all or any part of the land passed to the canal owner, the verdict can be altered accordingly. [This was assented to on the other side.]

The question of adverse possession becomes unimportant, for the

(a) *Ellis* here referred to the following statutes: Regent's Canal Act, 52 G. 3, c. cxov. (local and personal, public), ss. 1, 13, 20, 23, 110; Manchester, Bolton, and Bury Canal Navigation Act, 2 & 3 W. 4, c. lxix. (local and personal, public), s. 25; Kendal Canal Act, 36 G. 3, c. 97; Aire and Calder Navigation Act, 1 G. 4, c. xxxix. (local and personal, public), s. 30.

(b) Sir *John Jervis* had been engaged in the cause before he came into office; he now argued against the Crown by virtue of a special license.

reason already given. But the argument for the plaintiff is inadmissible: what has been done, if not authorized by the act, is not only evidence, but almost irresistible evidence, of an assumption of possession.

As to the first point. It is true that in the first part of stat. 32 G. 2, c. 2, s. 1, an easement only is given, as to the water from the brooks. But the power of entering, digging, making towing paths, and appropriating for wharfs and quays, cannot be a mere easement: it must carry with it the right to the soil. "Appropriate" is almost as strong a term as could be used. And it is not denied that these clauses affect the Crown land as well as the land of private persons. The argument put from the Bench, on the effect of sects. 85 and 95 of stat. 6 G. 3, c. 96, has not been answered. What can be the meaning of a clause *101] directing a party to reconvey land in which he has only an easement? *Buckeridge v. Ingram*, 2 Ves. jun., 668, was referred to; but the words insisted upon contain only an extrajudicial opinion. That case was before the Court in *Hollis v. Goldfinch*, 1 B. & C. 205 (E. C. L. R. vol. 8), where ABBOTT, C. J., relied on there being, in the act then under his consideration, no clauses of purchase or sale; whereas, here there are enactments to that effect. But, further, the intention of the legislature may be collected from stat. 33 G. 2, c. 2, which forms one of a series of acts relating to this canal, and, by sect. 2, incorporates stat. 32 G. 2, c. 2. And there, by sect. 7, it is expressly enacted that the works, matters, and things thereby authorized to be made, shall be the property of the canal owner. Unless, therefore, different rights over similar subject-matters are given by the different statutes, this clause is conclusive.

But, next, if the statute does not give the land at once, it clearly contemplates that the canal owner shall acquire the power necessary to carry the statute into effect by purchase; and therefore, where the statute has been acted upon (which is admitted here), the purchase must be inferred. It is suggested that evidence ought to have been given of an enrolment under sect. 4 of stat. 32 G. 2, c. 2. That evidence is not indispensable, supposing the enrolment necessary: but enrolment is not essential to the completion of the sale. The clause is merely directory. The statutory title to the land is given, under sect. 11, on payment of the purchase-money. But it is contended that the statute gives the Crown no power to sell; and it is sought to except the Crown out of *102] the general provisions for purchase by insisting on particular variations of phrase. This argument, however, leads to several inconsistencies. It is admitted that the Crown is included in the words "respective owners of and persons interested in such land," at the end of sect. 1, and in the words "the said several persons" in sect. 3. How then can the words in the purchase clause, sect. 4, "every other person and persons whomsoever, who are or shall be seised, possessed of,

or interested in any lands or grounds which shall be so set out and ascertained as aforesaid," be so construed as to exclude the Crown, the setting out referred to being that authorized by sect. 3, which is admitted to include the lands of the Crown? Then it is argued that, in the 6th section, the language includes the Crown where damage is the subject of enactment, but not where purchase is provided for: and it is said that the word "proprietor" includes the Crown. But, at the end of sect. 6, the verdict for purchase-money is made binding on the Crown as well as on others. And in sect. 23, where damage only is the subject-matter, the parties authorized to apply for compensation are described in the very words which, according to the argument on the other side, exclude the Crown. Further, in sect. 11, the money for purchase is to be paid to the "proprietors" of the lands purchased, which term is admitted to include the Crown.

T. F. Ellis, in reply.—As to the first point. The power to appropriate land to wharfs and quays does not carry with it a property in the land after the quay or wharf is erected. In the old turnpike road acts power is given to erect toll-houses, without any transfer of the soil. The acts leave that in the former owners; per *Lord KENYON [*103 in *Davison v. Gill*, 1 East, 64, 69. That a statutory power to erect such works as these is consistent with an absence of title, appears from *The Duke of Newcastle v. Clark*, 8 Taunt. 602 (E. C. L. R. vol. 4). This is also shown by *Hollis v. Goldfinch*, where the dictum in *Buckeridge v. Ingram*, 2 Ves. jun. 663, was cited, and at any rate not disapproved of. And the compensation given by sect. 1 of stat. 32 G. 2, c. 2, is to be made to parties whose lands are so "used," not "taken." Sect. 7 of stat. 33 G. 2, c. 2, affords a strong inference in favour of the plaintiff. The particular power given by that act does pass the title: but this makes the silence as to other powers the more important: and the observation becomes still more striking if the two statutes be taken as one statute with different clauses applicable to different lands.

The second point becomes immaterial if the plaintiff is right on the first. As to the Crown's power to sell, it is true that the word "proprietor," as used in sect. 6 of stat. 32 G. 2, c. 2, is large enough to include the Crown: but it does not follow that, wherever the word is used, the Crown must necessarily be included; and that is what the argument for the defendant, as to sect. 11, requires; otherwise the reasoning is merely a *petitio principii*. *Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation (July 5th), delivered the judgment of the Court.

In this case a verdict has passed for the plaintiff, on the demise of George Finch. And whether that can be sustained depends mainly on the construction of certain *clauses in acts of parliament under which the Duke of Bridgewater's canals have been extended into [*104 the manor of Halton, of which Her Majesty is the lady. In that right

she claims the land in question, through Finch her tenant. On the other hand, the defendants, in whom, as devisees in trust, all estate, right, and title which the statutes in question conferred on the Duke are admitted to be now vested, contend that under them the property in the soil passed.

As against Finch, a point was raised, that he at least was barred by adverse possession. But, at the same time, the Attorney-General, who appeared for the defendants, admitted this was but a by-point: and we understand it to be the wish of both parties that our judgment should proceed on the point mainly discussed, a decision upon which will settle the matter in dispute, and not merely dispose of the present action.

It appears that the land sought to be recovered adjoins a pool called the Big Pool: and this pool is created by damming up the water of a stream for the purpose of supplying a canal made under the powers given by stat. 6 G. 3, c. 96. At first it was larger than it now is, and covered a portion of the land in question. Later arrangements have enabled the defendants to reduce its size, and also to carry off surplus water in times of flood, without interfering with the use of the surface as before: and they have erected limekilns in part on the space so gained. If, therefore, the statute gave them no more than such use of the soil as was necessary for the purpose of the canal, and they have not acquired the freehold in any other way, the right will now be in Her Majesty, and the verdict for her tenant is right. And we are of this opinion.

*105] *Stat. 6 G. 3, c. 96, commences with three sections, giving the necessary powers for making the canal; (a) and, among these, the largest rights upon the lands through which it is to pass or which may be in any way necessary to it; and, among the owners whose lands are by the 1st section made subject to these rights, the "King's Majesty, his heirs or successors," are specifically mentioned, followed by the words "any other person or persons, bodies politic, corporate, or collegiate." The 2d section, which is confined to the lands *through* which the canal and other works are intended to be made, and authorizes an entry for the purpose of surveying and levelling, and *setting out such parts as may be necessary for the making of the canal and works*, drops all mention of His Majesty, and commences with the words "said several persons, bodies politic," &c.: and the 4th section, which refers expressly to the 2d and empowers sale by persons or bodies under incapacity to convey, has the same omission, beginning with "all bodies politic, corporate, or collegiate, corporations," "husbands, guardians," &c.

(a) The early sections of stat. 6 G. 3, c. 96, relate to another undertaking, that of The Company of Proprietors of the Navigation from the Trent to the Mersey. Sect. 84 and the following sections relate to the canal in question here. But, as this section gives the powers conferred by the earlier acts, and as those powers are substantially the same which are given in the early sections of stat. 6 G. 3, c. 96, the reasoning in the judgment is not affected.

It appears, upon reference to the preceding acts of the series which are applicable to the Duke of Bridgewater's canals, 32 G. 2, c. 2, 33 G. 2, c. 2, 2 G. 3, c. 11, that the same insertions will be found in the 1st sections respectively, and the same omissions in the following sections. Probably the two later and stat. 6 G. 3, *c. 96, were framed, *mutatis mutandis*, upon the model of the earliest act. [*106 Still the circumstance warrants the remark that the subject has been four times at least under the consideration of the legislature, and more particularly perhaps under that of the agents of the undertakers, and the same distinction between the wording of the different clauses always preserved. We do not, however, consider the omission of Her Majesty by name to be at all conclusive, especially as the Crown is clearly within the 6th section: for it is there said in terms that the decision of the jury there authorized to try certain issues shall be binding on "the King's Majesty," &c.: and yet the preamble of that section only speaks of differences between "the Company of Proprietors," "and the *several proprietors* of and persons interested in any lands, &c.:" under which general words therefore His Majesty must be included. But this section again is not conclusive that the Crown was included in the section empowering to convey, because it extends, not merely to differences about purchase-money, but to recompense to be made for prejudice done to lands by the execution of any of the powers given by the 1st section.

But we have examined with attention the provisions of the 4th section as to conveyances by the incapable parties included therein, and their enrolment by the clerk of the peace, those of the 13th,^(a) with regard to the effect of verdicts determining the amount of purchase-money where that has been disputed before juries; and those of the 14th with regard to the application of purchase-money when paid: and the result in our minds *is a clear conviction that the notion of a sale by the Crown was never present to the minds [*107 of the framers; that the provisions are not applicable to such a case; and that, if a sale by the Crown had been contemplated, a different and distinct provision would necessarily have found its way into the act.

But, farther that this, if we assume that, under the act, the Crown could sell, and that the undertakers did in fact take possession of the land in question for the purpose of the canal, and contracted for the purchase, we cannot understand why no evidence of such purchase was forthcoming at the trial. Not to mention that in all transactions with the Crown the evidence may be expected to be preserved with more than ordinary care, and be more than ordinarily available, it is to be remembered that, whether the price had been settled by agreement

(a) The 13th and 14th sections of stat. 6 G. 3, c. 96, relate to the Trent and Mersey navigation. See note, p. 105.

or verdict, there would have been the enrolment with the clerk of the peace, and a copy might have been produced in evidence. We feel satisfied, therefore, in fact, that the Crown has not by any specific transaction conveyed the land to the canal proprietors.

But the defendants stand upon the presumption to be drawn from their long possession. We think, however, that the circumstances entirely destroy the groundwork of any presumption by which the Crown could be barred. So long as the ground was covered with water ponded back for the purposes of the canal, or was used as a passage for waste water on the surface when necessary, it was difficult to say that the canal proprietors were doing anything but what their act justified them in doing. So long, they exercised powers and used the land in a way which the Crown could not interfere with, and which was consistent with the Crown's retaining the freehold in the soil.

*108] And this state of things we collect to have continued, in part or in the whole, down to within twenty years. The case finds that the limekilns were built only ten years before the trial: and this seems to be the first decisive act by which the canal proprietors gave up the use of the land for the purposes of the canal, and treated as if they were the general proprietors. Until that was done, we do not see how the Crown was called on, or could properly have asserted a right to the exclusive possession, or treated the canal proprietors as trespassers.

Upon all grounds, therefore, we think the claim of the defendants fails, and that the verdict ought not to be disturbed.

Judgment for plaintiff.

Afterwards, in the Michaelmas term following, (a) Sir *F. Thesiger*, *T. F. Ellis*, and *Townsend* appeared to show cause against the rule on the points not involving the above questions of law: and Sir *J. Jervis*, Attorney-General, *Welsby*, and *Egerton* appeared in support of the rule. The points were confined to questions as to the weight of evidence, and to an alleged surprise and discovery of fresh evidence: but these were now abandoned by the counsel supporting the rule, who, however, insisted that the effect of the above judgment was confined to a portion of the land in dispute, and that the verdict ought to be entered up distributively. It was agreed that the Court, without hearing argument, should pronounce judgment explaining the effect of the former judgment.

Cur. adv. vult.

*109] *COLERIDGE, J., in the following vacation (December 18th, 1849), delivered the judgment of the Court.

In this case the Attorney-General applied to have the verdict restricted to a certain part of the premises sought to be recovered. But we see no reason for any special interference. In the judgment

(a) November 22d, 1849. Before PATTESON, COLERIDGE, and WIGHTMAN, Js.

which we pronounced in July last, we proceeded on the ground that the acts of parliament under which the defendants claim do not pass to them the property in the soil of which the ownership is in Her Majesty. But we said nothing in prejudice of their easement: and that easement we consider so extensive in its nature that the enjoyment of it may require the entire and exclusive possession. We thought that, for certain parts of the land, the defendants had abandoned the user for the purposes for which the easement was granted to them, and for which alone they had any right to occupy; and that the lessor of the plaintiff was therefore entitled to enter and resume possession of such parts. The sheriff ought only to deliver possession of such parts: and we must presume that the lessor of the plaintiff will instruct him accordingly. If there should be any attempt to execute the writ in such a way as to interfere with that possession which is essential to the full enjoyment of their easement, the defendants will apply to the Court, or to a Judge at chambers.

Rule discharged.

*The QUEEN v. The Inhabitants of the Parish of CARLTON. [*110

A building club was formed by subscribers to an indenture, which recited the purpose to be raising a capital stock for erecting dwelling-houses; and they agreed to articles, which provided: That every subscriber should pay 6s. 8d. monthly: freehold land was to be purchased by the club for erecting houses: each member to take as many houses as he should have shares: the houses to be built according to a plan annexed, and under the inspection of the agents of the Society: the order in which the members should take the houses to be determined by lot, till all the shares should be drawn: no member to mortgage his house till the conclusion of the Society, but each to pay rent to the officers, which was to be deemed a vesting of property in them: no subscriber to have power to let or sell his house till security should be given to the satisfaction of the president: the monthly payments and rents to be placed to the funds of the Society till the whole subscriptions should be completed and all the dwelling-houses be allotted, and possession of them given to the respective subscribers; the president meanwhile to have the power of distraining for the rent: if a member, after being put in possession of a house, should lock his door, quit the neighbourhood for six months, and neglect to pay his monthly payments and rents, the president and steward might take possession of the house and let or sell it: at the determination of the Society, each member was to be fully entitled to his share, and a conveyance thereof at his own expense; the surplus stock to be divided; and meanwhile each member to pay 1*l.* yearly, and to forfeit his share upon making default of any of the payments provided for: the Society not to be broken up while six members existed, or before all the buildings should be completed.

The club contracted for the purchase of land, and commenced building without any conveyance being made to them. The land was afterwards, by deed to which the club was party, mortgaged to A. for money advanced to the club. The whole purchase-money paid by the club amounted to more than 30*l.*, but not to so much as 30*l.* for each subscriber. In 1824 and 1825, E., a member of the club, drew his share, had a house built for him, and entered into possession; and he paid rent till the mortgage was paid off, when the mortgagee conveyed the house to E. and the other members severally. The club had shortly before ended, the shares having been paid up and the houses built. At the time when the club ended, E.'s monthly and annual payments, exclusive of rent, exceeded 30*l.*: but such payments made before he came into possession did not amount to 30*l.* The house was not of the annual value of 10*l.*

Held that E. acquired a settlement by residence in the house after the conveyance to him, not having had any legal or equitable estate until the time of such conveyance, and having before that time paid more than 30*l.*, so as to satisfy stat. 9 G. 1, c. 7, s. 5.

ON appeal against an order of justices, removing Jane Ellison and her two bastard children from the parish of Carlton, in the West Riding of Yorkshire, to the township of Marsden, in the county of Lancaster, the sessions quashed the order, subject to the opinion of this Court on a case.

The case set out the order and examinations, which showed a settlement in Marsden. The question which alone was ultimately argued in this Court was, whether *a settlement was shown in Carlton, by *111] parentage, under the following facts stated in the case.

A building club, called the Carlton Building Society, was formed in April, 1822, of which Hugh Ellison, the father of the pauper, then became a member and a subscriber for one share. The club consisted of fourteen members: and their object was the erection, upon a piece of land to be purchased for that purpose, of an equal number of houses as there were shares subscribed for by the members. The funds necessary for buying the land and building the houses were to be obtained by the periodical payments of each member, the rents arising from time to time from the houses as they should be completed and occupied, and fines payable by the members for infractions of the rules of the club, as severally specified in certain articles of agreement entered into by the members on the formation of the club; a copy whereof was annexed to, and to be taken as part of, the case. The members of the club entered into a contract for the purchase of a piece of freehold land in Carlton, and commenced building houses thereon before any conveyance was made to them of the property. Afterwards, by a deed, dated 9th April, 1822, and to which the club were parties, reciting the agreement made by the vendor with the club for the sale to them of the land, the land and houses were conveyed by way of mortgage to Henry Alcock, to secure the sum of 173*l.* 14*s.*, paid by him at the request and by the direction of the club, as and for the purchase-money of the said land, the sum of 100*l.* advanced by him to the members of the club, and all such further sums of money as he should advance to them, not exceed-
*112] ing in *the whole 500*l.* The purchase-money for the land did not amount to the sum of 30*l.* for each member of the club. By a deed, dated 16th December, 1825, the property was charged with a further sum of money. The order in which members were entitled to have houses built for them was determined by lot. In March, 1824, Hugh Ellison drew his share: and, between that time and August, 1825, had a house built for him by the club on the purchased land, according to the articles of agreement. And, during the last-mentioned month, he entered into possession thereof, and continued to live therein with his family till 1842, when he died. He paid rent for the house to the club from 1832 to July, 1838. He was assessed and paid rates for the relief of the poor of the parish of Carlton from July, 1833, though, previous to that time, the club had paid them for that house. The

annual value and rent of the house was under 10*l*. On 1st April, 1829, Hugh Ellison had paid upwards of 30*l*. by his monthly and annual payments in respect of his share in the building club. The club ended in July, 1838; when all the shares were paid up, and the houses built, and Hugh Ellison had paid, in monthly payments of 6*s*. 8*d*. each, the sum of 65*l*., and, in annual payments of 1*l*. each, the sum of 16*l*., making together the sum of 81*l*.

On 23d November, 1839, the moneys and interest then due to him from the club having been paid off by them, the mortgagee conveyed the land with the houses so built on it to the several members of the club. And the house so occupied by Hugh Ellison was by the said deed conveyed to him in fee. The pauper, Jane Ellison, lived unemancipated with her father in Carlton till his *death, in 1842; and her eldest [*113 bastard child was born there.

Upon these facts, the respondents contended that Hugh Ellison, and consequently the pauper, did not acquire a settlement in their parish. The sessions held, subject to the opinion of this Court, that Hugh Ellison did acquire a settlement in the parish of Carlton, which the pauper derived from him.

The question for the Court was, whether Hugh Ellison acquired a settlement in the parish of Carlton, which the pauper, Jane Ellison, derived from him. If this Court should be of that opinion, the order of sessions was to be confirmed: otherwise the order of sessions to be quashed, and the order of justices to be confirmed.(a)

The indenture containing the articles annexed to the case, witnessed that the subscribers thereto, "for the better improving our respective estates by uniting, aiding, and assisting one another, and for divers other causes and considerations, have mutually concluded and agreed to associate in a joint concern for the purpose of raising a capital stock or fund, by way of subscription, for the purpose of erecting cottages or dwelling-houses," and did agree to abide by articles set forth, from which the following are extracts.

"1. Every person wishing to become a member of this Society shall, for every single share, pay or cause to be paid the sum of 6*s*. 8*d*. of lawful money of Great Britain on the first Monday of every calendar month, from the 1st day of April, 1822, until all the shares subscribed for shall be paid.—2. The affairs of this society shall be managed and conducted by a president, a steward, and a committee of nine members." "That an annual meeting of the Society shall be held on the first Monday in April in each *year, at the house," &c.—"3. At the first annual meeting [*114 a committee consisting of nine members shall be balloted for out of the whole society, in the manner that shares are drawn, as in article fifth, any five of whom," &c. (quorum for deciding in matters of arrangement or dispute not provided for in the articles, subject to the approval or alteration of a general meeting).—"5. A plot of freehold land will be purchased by the Society for the erecting of houses; which ground, when purchased, shall be built upon by the Society, according to the

(a) Some other points were reserved, which were not pressed in argument.

plan and specification hereunto annexed: and that any member having more than one share in the Society shall take so many houses in numerical order, according as the same are numbered upon the said plan, as he, she, or they may have shares in the Society next adjoining the number previously drawn; and that any member being desirous of making any internal alterations different from the plan or specification shall pay such extra expense to the contractor or contractors of the building: and that no member be allowed to make any external alteration whatever, so long as this Society shall exist. The officers shall proceed to the drawing of the shares by causing to be deposited each member's name in a bag, and drawing thereout by some indifferent person the names of the whole members. And it is hereby agreed and understood that the person whose name shall be first drawn shall be entitled to the lot No. 1, upon the said plan, and so, in regular succession, until the whole of his, her, or their shares, viz., till the shares of the whole members, be drawn.”—7. Provisions for forfeiting the shares of members not making up the monthly payments.—“8. It shall not be in the power of any subscriber to mortgage his, her, or their respective lot or lots, or dwelling-house or dwelling-houses, or be esteemed to have power so to do, until the final conclusion of this Society; but that the payment of rent, from time to time, to the officers for the time being shall be deemed such a vesting of property in them, so as to prevent any security given being valid: nor shall such subscriber or subscribers have power to let or sell such lot or lots or dwelling-house or dwelling-houses until security shall have been given to the satisfaction of the president for the time being for the whole money advanced. And the monthly payments, rents, and fines shall be received by the president and stewards, and placed to the funds of the said Society, until the whole subscriptions be completed, and the whole of the dwelling-houses allotted and given proper possession of to each and every subscriber respectively. And, if any subscriber shall occupy the house that is allotted for him, her, or them, he, she, or they must pay the rent monthly to the president and steward, at each monthly meeting. Any subscriber neglecting to pay his, her, or their monthly rent or rents, as above mentioned, shall be subject to the same rules and regulations as are hereinbefore mentioned and declared, viz., shall pay the like forfeits” as in case of non-payment of monthly subscriptions; and the president may also enter and distrain.—“9. The erection or erections upon the *115] lot or lots of each subscriber shall, during the continuance of *this Society, be under the inspection of the president and steward for the time being, or a competent person appointed by them for that purpose; and that money should (a) be issued from the fund, from time to time, as a majority of the committee shall think proper for such erection or erections.”—10. Provision for transfer of shares.—12. Provision for substituting the representative of any subscriber who shall die before the building on his lot be completed or the whole of his subscription paid.—“15. In case any person, being a member of this Society, after having drawn his, her, or their lot or lots, his, her, or their house being built, and he, she, or they in possession of the same under the sanction of the proper officers of this Society, shall lock up his, her, or their door, and quit the neighbourhood for six months, and neglect to pay or refuse to remit his, her, or their several monthly payments, rents, and forfeitures as the same shall become due, in such case it shall and may be lawful for the president and steward for the time being to take possession of the said premises, without being liable to any action at law or equity being commenced against them: and they shall be, and hereby are, empowered to let or sell the same to some such other person or persons as they may think proper, anything heretofore contained to the contrary thereof notwithstanding.—16. Each subscriber, his, her, or their executors, administrators or assigns, shall, when the whole of the erections and buildings, intended by the members of this Society to be erected and built upon the plan heretofore mentioned, are completed, pay for their own conveyance or other title of his,

her, or their respective share or shares out of his, her, or their own money not concerned in the stock or fund of this Society."—"22. All and every of the subscribers, his, her, or their heirs, executors, administrators, or assigns, paying their respective subscriptions, fines, rents, and arrears as above mentioned, and agreeing to the articles herein contained, on his, her, or their respective part or parts and behalf to be performed and done, shall, at the end and determination of this Society, be fully, clearly, and severally entitled to his, her, or their respective share or shares, and the respective conveyance or conveyances: and the surplus (if any) of the capital stock or fund shall be divided amongst the then members in proportion to their respective share or shares therein.—23. Every member shall, for each share besides his monthly contributions, pay into the Society every year 1*l*. at the yearly day, or by dividends at any of the monthly or quarterly nights, so as to make up the aforesaid pound on or before the annual meeting. Any member neglecting to pay the above in the manner mentioned at the annual day shall pay the like forfeits and be subject to the same rules and regulations, as for non-payment of his, her, or their subscription-money."—"26. This Society shall not be broken up while there are six members existing, or before the whole of the erections and buildings, intended to be erected and built upon the plan or specification herein mentioned, shall be completed."

*The case was argued in Easter term, 1848.(a)

Pashley and Frederick Thompson, in support of the order of [*116 sessions.—Hugh Ellison had a settlement in Marsden by estate. On the 23d November, 1839, when the land was conveyed to him, he had paid for it, by instalments of different kinds, more than 30*l*.; and the settlement of Jane Ellison, by residence with him, unemancipated, after that date, is therefore established. The rules describe only a state of things in which the right of the subscriber to the land was incomplete until the arrival of the time contemplated in articles 16 and 22. It is not material whether a settlement was complete before the conveyance. Under stat. 13 & 14 C. 2, c. 12, s. 1, H. Ellison would have been irremovable as soon as he had a right to the land; and then forty days' residence would have given a settlement; *Rex v. Staplegrove*, 2 B. & Ald. 527; in which case the only interest which the pauper had was a reversion on a term for 1000 years. Then stat. 9 G. 1, c. 7, s. 5, makes it necessary to the settlement, where the estate has been acquired by purchase, that the consideration should have amounted to 30*l*. Here, at the time of the conveyance, more than that sum had been paid. The attempt on the other side will probably be to show that the land passed originally, before the conveyance, for a consideration less than 30*l*., and that the money since paid is like money laid out in improving property; in which case, undoubtedly, no settlement would be created; *Rex* [*117 **v. Dunchurch*, Burr. S. C. 553.(b) But the consideration is not strictly confined to the purchase-money: thus, where the purchase-money of a copyhold estate, together with the fine and fees, amounted to 30*l*., this was held to satisfy the statute; *Paul's Walden v. Kemp-ton*, *Foley's Laws relating to the Poor*, 338 (4th ed.) And in fact the land here did not pass before the conveyance: Hugh Ellison had not

(a) May 3d. Before Lord DENMAN, C. J., PATTERSON, WIGHTMAN, and ERLE, Js.

(b) S. C., as *Dunchurch v. South Kilworth*, 1 W. Bl. 596.

even an equitable right to call for a conveyance. Further: the whole land in this case was purchased by the club for more than 30*l.*; and the statute does not, in terms, require that the purchase-money should be paid by the person having the settlement: the Court will read the words of the act "in their ordinary and usual grammatical sense, unless that mode of construction leads to manifest inconvenience, or is repugnant to the plain intention of the legislature; per PARKE, B., in *Edmonds v. Lawley*, 6 M. & W. 285, 289.† Under stat. 13 & 14 C. 2, c. 12, s. 1, it has been held that the words "person or persons coming so to settle as aforesaid, in any tenement under the yearly value of 10*l.*," are not satisfied by two persons jointly hiring a tenement for 16*l.* a year, and occupying it jointly, each paying a moiety; *Rex v. Marden*, Sayer's Rep. 9. But there the statute connects the value with the tenement; and neither of the "persons" had a tenement of more than half what was hired: here the statute does not connect the consideration with the "person or persons" at all, but simply with the "purchase." Neither, again, is it clear that this case comes within stat. 9 G. 1, c. 7, s. 5, at all: it is not one of purchase, in the proper sense of the word.

*118] *R. Hall and Pickering*, contra.—At some time or other there was a purchase: if the father has purchased for less than 30*l.*, the daughter has no settlement; *Rex v. Salford*, Burr. S. C. 516.(a) *Rex v. Staplegrove*, 2 B. & Ald. 527, was a case, not of purchase, but of occupation under a supposed devolution by operation of law. In *Paul's Walden v. Kempton*, Foley's Laws relating to the Poor, 338 (4th ed.), 30*l.* was actually paid to the vendor, the lord, and the steward; and so each sum made part of the consideration; and this is the explanation given of the case by BAYLEY, J., in *Rex v. Cottingham*, 7 B. & C. 603 (E. C. L. R. vol. 14), where it was held that money paid by a purchaser to his own attorney for the surrender formed no part of the consideration. It is argued that, as the whole land cost more than 30*l.*, every subscriber, however small his interest, gained a settlement: but such a construction of the statute would be "repugnant to the plain intention of the legislature," which manifestly intended to prevent the acquisition of settlements by persons purchasing for trifling sums. It is true that Hugh Ellison did not acquire the legal estate till after he had paid more than 30*l.* But the question is, whether he had not, before that, acquired an interest: if he had, he purchased at the time of such acquisition; and then, according to *Rex v. Dunchurch*, Burr. S. C. 553, S. C. 1 W. Bl. 596, the subsequent payments are unimportant to the settlement. [ERLE, J.—Could he, at the time of the original purchase, have filed a bill to compel conveyance?] The club might have done so

*119] on paying off the mortgage, as appears from the language of BULLER, J., in *Rex v. Lopen*, 2 T. R. 577, though Hugh Ellison

could not have insisted on a conveyance to himself of the actual portion: but he had an equitable interest in the whole. This was not the less so for the property being mortgaged, the mortgagee not being in possession; *Rex v. Edington*, 1 East, 288. In *Rex v. St. Michael's, Bath*, 2 Doug. 630, S. C. Cald. 110, there cited and distinguished, the debts exceeded the amount of the mortgages and the value of the property, and the mortgagor had been out of possession, but had regained possession by fraud. In cases under this statute it is immaterial who paid the money; *Rex v. Tedford*, Burr. S. C. 57. No new right was created by the legal conveyance. The agreement between the club and the vendor was that which gave each subscriber his right; *Baxter v. Brown*, 7 M. & G. 198 (E. C. L. R. vol. 49). [WIGHTMAN, J.—I do not see who the mortgagor was here: the person to whom the mortgage was made was rather in the position of a trustee. ERLE, J.—It is said in Mr. Archbold's Poor Law,^(a) that, "to gain a settlement by a purchase under this act, the party must have, not merely an equitable right," "but an equitable estate."] In *Rex v. Catherington*, 3 T. R. 771, it was held that, where a mortgagee permitted a mortgagor to reside, not in the character of a mortgagor, but for a particular purpose, the mortgagor gained no settlement by such residence. [PATTESON, J.—Is there any case in which a conveyance from a trustee to the cestui que trust has *been treated as a transaction between vendor and vendee?] [*120 None such has been found. *Cur. adv. vult.*]

Lord DENMAN, C. J., in this vacation (July 11th), delivered the judgment of the Court.

In this case the question was, whether Hugh Ellison gained a settlement by purchase of an estate or interest in land of which the purchase-money *bonâ fide* paid was 30*l.*

The fee simple was conveyed to him in 1839, at which time he had paid 81*l.*; and the conveyance was made to him in consideration of that money. But it was contended that he had in 1822 acquired an equitable estate in the land on which the house was afterwards built; that such estate was acquired for less than 30*l.*; and that, if the value was raised to the requisite amount only by improvements subsequent to the purchase of the interest, no settlement was gained. The law is clearly so; *Rex v. Dunchurch*, Burr. S. C. 551, S. C. 1 W. Bl. 596. But we do not find the facts to bring the present case within that law.

The agreement for the purchase was by the building club for the purposes thereof; and the mortgage was by the same club: and, although the members of the club had an interest in the land while the buildings were going on, yet no individual member had a clear equitable estate in any particular portion or house until it was actually conveyed. In *Rex v. Woolpit*, 4 Dowl. & R. 456 (E. C. L. R. vol. 16), BAYLEY, J., citing *Rex v. Geddington*, and *Rex v. Long Bennington*, 6 M. & S. 403,

(a) P. 569 (6th ed.). Citing *Rex v. Geddington*, 2 B. & C. 129 (E. C. L. R. vol. 9).

*121] states that an equitable right is *not sufficient to confer a settlement; it must be an equitable estate actually vested. Then, if the equitable interest prior to the conveyance would not have been sufficient to have conferred a settlement if a sufficient price had been paid, neither was it sufficient to make the time of the acquirement of that interest the time of the purchase, so as to make the subsequent build-ings to be improvements after the purchase.

We do not find that any estate was vested in the pauper's father till the conveyance of the fee; and at that time the purchase-money paid amounted to more than 30*l.*; and consequently a settlement was gained.

Therefore the order of sessions is confirmed.

Order confirmed.

*122] *The ROCHDALE Canal Company v. KING and Others.

Stat. 34 G. 3, c. 78, empowered a company to purchase lands for making and maintaining a navigable canal, and contained provisions with respect to the conveyance of land, and its vesting in the company on payment of the price assessed by compensation juries. It was also provided by the same act (explained by stat. 46 G. 3, c. xx. s. 23) that manufacturers within a certain distance of the canal might, after notice to the proprietors of the canal, lay down pipes to supply their steam engines with water for the sole purpose of condensing the steam used for working such engines; and that, if any dispute should arise with any person desirous of taking water for the above purpose, or who should be in the use of taking the same, such dispute should be finally determined by certain commissioners.

A declaration in case by the Company stated that the canal had been made and maintained by them in pursuance of the act; that defendants, having steam engines within the prescribed distance of the canal, had, after notice to the Company, laid down pipes communicating with the canal, and that defendants had used the water drawn off by such pipes for other purposes than condensing the steam of their engines.

It was objected in arrest of judgment, and afterwards on writ of error, that the declaration did not show any conveyance or ownership of the canal or water; nor did it show any invasion of a private right, or damage to such a right, inasmuch as the act complained of, if wrongful, was clearly prohibited by statute, so that a repetition of the act could never be used as evidence that it was rightful; also that the remedy was by indictment as for the violation of a statutory provision; and, further, that the complaint was a dispute over which the commissioners under the act had exclusive jurisdiction: Held by Exch. Ch., affirming the judgment of Q. B.:

That the declaration was good; that it must be taken that the Company was in possession of the canal; and that, without averment of special damage, the wrongful act appeared to be a damage to the Company's right; that the disputes over which the commissioners had jurisdiction were disputes with persons, either about to use or in the actual use of the canal water for a rightful purpose, as to the mode of taking such water, and that the provision for reference to the Commissioners did not apply to a mere wrongful act.

Held also, per ERLE, J., that, even if such an act were within that provision, the superior courts had concurrent jurisdiction.

CASE. The declaration stated that, after the passing of stat. 34 G. 3, c. 78, (a) a certain canal was made by the said Company in pursuance

(a) "For making and maintaining a navigable canal from the Calder navigation, at or near Sowerby Bridge Wharf, in the parish of Halifax," &c.; "to join the canal of his Grace the Duke of Bridgewater, in the parish of Manchester," &c., "and also certain cuts from the said intended canal."

The declaration was founded on the 113th section, which is as follows:

of and *according to the powers and provisions in the said act contained; and, before and at the time when, &c., the said canal [*128

"And whereas steam engines are become of great use in various manufactures carried on within the said counties, and as such engines consume considerable quantities of coal, they will, by the rates which will be payable for such coals, tend to promote the interests of the said navigation, but the said engines can only be made use of where cold water can be obtained to condense the steam, on which account, as well as for the better supply of the same with coals, it would be convenient to erect such steam engines as near as may be to the said navigation; be it therefore further enacted, that it shall be lawful for the owners of any lands within the distance of twenty yards from the said canal and cuts, or any of them, to make a communication between the water therein, and any steam engine or engines, by means of one or more metal pipe or pipes of sufficient strength or thickness, and so constructed as to prevent any leakage or waste of water, and to draw from the said canal and cuts, or any of them, such quantities of water as shall be sufficient to supply the said engine or engines with cold water, for the sole purpose of condensing the steam used for working any such engines as aforesaid: Provided always, that the proprietor of every such engine shall return to the said canal and cuts, or some of them, in every day on which he shall use such engine, a quantity of water on the same level on which it shall be taken, equal to the quantity so taken in every such day from the said canal and cuts, or any of them (the inevitable waste thereof by condensing such steam only excepted), so that no obstruction shall arise therefrom to the said navigation: provided also, that such water so taken shall be applied to the working of the said engine, and to no other use or purpose, and that every person laying any such pipe into the said canal, or either of the said cuts for such purpose, shall, and is hereby required to make good the bank thereof, and to repair, at his own proper costs and charges, all such other damages as may arise from the laying in of such pipe, in such manner, and at such times as shall cause as little let, hindrance, or molestation, as may be, to the said navigation, or to the persons using the same: provided nevertheless, that no person shall take any water from the said canal or cuts, or any of them, for the use of any such engine, without giving one month's previous notice in writing of such his intention to the committee of the said company of proprietors, in order that the said committee may appoint a person or persons to inspect into the premises on their behalf, and to take care that the said pipe is of a proper strength and thickness, and be laid into the bank in a proper manner, according to the intent and meaning of this act; and if any dispute shall arise between the said company of proprietors, or the said committee, and any person who shall be desirous of taking water out of the said canal or cuts, or any of them, for the purposes of any such engine, or who shall be in the use of taking the same therefrom, such dispute shall be finally settled and determined by the said commissioners."

Section 1 incorporated the proprietors for the purposes of the act by the name of "The Company of Proprietors of the Rochdale Canal," with power to purchase lands, &c., for making the said canal, &c. By section 8 Select Commissioners were appointed to determine at what places and in what manner gauges should be constructed for the purpose of regulating the taking of surplus water from certain brooks; and by section 24 commissioners were appointed "for settling, determining, and adjusting, all questions, matters, and differences, which shall or may arise between the said company of proprietors and the several proprietors of, and persons interested in any lands or other hereditaments, that shall or may be taken, used, affected, or prejudiced by the execution of any of the powers hereby granted, and for other the purposes in this act mentioned, except such as are hereby directed to be done by the said select commissioners aforesaid."

By section 22, bodies politic, &c., trustees, &c., and persons under disability, were empowered to convey land to the company.

By section 29, the commissioners mentioned in the 24th section were authorized to determine the sums to be paid by the company for the purchase of land for the canal, &c., and as a recompense for damages sustained by the supplying the canal with water; and, in case of dissatisfaction with their determination, juries were to be summoned to assess such sums; and by section 35 the determination of the commissioners, if acquiesced in, and the verdicts of juries, were to be kept as records; and, on payment or tender of the purchase-money for lands, such lands were to vest in the company in fee simple. Section 95 empowered the company to take tolls on goods conveyed along the canal.

By sect. 23 of stat. 46 G. 3, c. xx. (local and personal, public), "for enabling the Company of Proprietors of the Rochdale Canal more effectually to provide for the discharge of their debts;

*124] was, and still is, a navigable canal, maintained by *the said Company for the purposes in the said act specified. That defendants were, and still are, the owners, and possessed, of certain lands within *125] the distance of *twenty yards from the canal, and of a certain cotton mill and divers, &c., steam engines, then being on the said lands, the said engines being erected and used by defendants for the purpose of working the said mill. That defendants, to wit, on 1st January, 1844, gave notice to the Company that they intended to make a communication between the water of the canal and the said steam engines, according to the provisions of the act, in order to draw from the canal such quantities of water as should be sufficient to supply the said engines with cold water for the purpose of condensing the steam used for working the said engines. That, in pursuance of the said notice, to wit, on, &c., divers metal pipes were laid down by defendants *126] between the canal *and the said steam engines, for the purpose of making, and so as to make, the said communication according to the provisions of the said act. That, although afterwards, to wit, on, &c., divers large quantities of water were drawn off from the canal, through and by means of the said pipes, which water defendants ought to have used for the sole purpose of condensing the steam used for the working the said engines, nevertheless defendants wrongfully and injuriously deceived and defrauded the plaintiffs in this, to wit, that defendants, after the said quantities of water had been so drawn off from the canal, wrongfully and injuriously used and applied the same for other and different purposes and uses than the condensing the steam used for working the said engines, to wit, for the purposes and uses of supplying the boilers of the said engines with water, and of generating steam for

and to amend the several acts passed for making," &c., "the said canal," it was enacted as follows:

"And whereas the power of taking water for the condensing of steam in the engines, near to the said canal and cuts, granted by the said recited act made in the thirty-fourth year of the reign of His present Majesty, may be abused, and it is expedient that the provision relating thereto should be explained and amended; be it therefore further enacted that, from and after the passing of this act, it shall be lawful for any agent or servant, or agents or servants, appointed by the committee of the said company for that purpose (on making information in writing on oath, to be administered by any justice of the peace residing in the neighbourhood of the place where such water shall be taken, that such agent or servant, or agents or servants, suspects or believes or suspect or believe that such power is abused; and on depositing in the hands of such justice the sum of 20*l.* for the purposes hereinafter mentioned, and delivering to the person or persons using such water a copy of such information) at all seasonable times to enter into any building containing such steam engine, for the purpose of examining any pipe used for the conveying of such water, and ascertaining the use made of such water, and that the same is not applied to any other purpose than that of condensing the steam of any such engine; and in case it shall appear that such water is applied to no other purpose than that of condensing steam, then such justice shall, by and out of the said sum of 20*l.*, pay unto the owner or owners, or occupier or occupiers, of such steam engine, all such costs, charges, and expenses as he or they shall have sustained or been put unto in laying open and showing such pipe or pipes, and in covering the same, and restoring the works connected therewith to their former state, or in any manner relating to such view, and pay the residue of such moneys, or (in case it shall appear that such water is applied to any other purpose than that of condensing steam) the whole of such moneys to the said company of proprietors:" &c.

working the said engines, and for heating the said mill, and for the purpose of cleansing the said boilers, and divers other purposes, contrary to the provisions of the said act. Second breach: that defendants further wrongfully and injuriously deceived and defrauded plaintiffs in this, to wit, that defendants, on, &c., wrongfully and injuriously, by means of the said pipes, drew from the canal more quantities of water than sufficient to supply the said engines with cold water for the sole purpose of condensing the steam used for working such engines, contrary to the provisions of the same statutes. Third breach: that although defendants did, on each of the days and times aforesaid, draw from the canal, through and by means of the said pipes, divers other large quantities of water, to wit, &c., on each of the said days, for the purpose of working the said engines, and then applied the same to the said *purpose, and did, on each of the said days, use the said [*127 engines, nevertheless defendants deceived and defrauded plaintiffs in this, to wit, that defendants did not, on each of the said days on which they so used the said engines as aforesaid, or on any of them, return to the canal a quantity of water equal to the quantity so taken on each of the said days from the canal, inevitable waste thereof by condensing steam only excepted; but, on the contrary thereof, defendants, wrongfully and injuriously contriving to injure plaintiffs, did, on each of the said days, wrongfully return to the canal a much less quantity of water than the quantity so taken, &c.; whereby the navigation of the said canal has been and still is greatly impeded and obstructed.(a)

Plea: Not guilty. Issue thereon.

On the trial, before ERLE, J., at the Liverpool Summer assizes, 1848, it appeared that the canal had been made and maintained in pursuance of the act, and that water had been supplied to the canal by the Company at a great expense. The defendants were mill-owners on the banks of the canal, who had erected steam-engines for the purposes of their business, and had laid down pipes for the purpose of drawing water from the canal. The jury found that the defendants had used the water so drawn, and for other purposes than for the condensation of the steam in their steam-engines, but that they had not thereby obstructed the navigation. Verdict for plaintiffs, damages 1s.; leave being given to defendant to move for a nonsuit, on the ground that the action was not maintainable without proof of damage.

Martin, in last Michaelmas term, obtained a rule nisi *accord- [*128 ingly, citing *Williams v. Morland*, 2 B. & C. 910 (E. C. L. R. vol. 9). He also obtained a rule nisi to arrest the judgment, because the declaration did not show that the Company had any property in, or possession of, the canal, and that the defendants had infringed any private right; or that any private damage had been sustained; or that the acts complained of were wrongful; and also on the ground that the

Commissioners named in stat. 84 G. 3, c. 78, sect. 24,(a) had exclusive jurisdiction over the matter in dispute under sect. 113. In this vacation (June 20th and 23d),

Knowles, Tomlinson, and Cowling showed cause.—The 113th section does not oust the jurisdiction of this Court; there are no express or negative words on the subject; the Court, therefore, has concurrent jurisdiction. The decisions in *Crisp v. Bunbury*, 8 Bing. 394 (E. C. L. R. vol. 21), and *Rex v. Mildenhall Savings Bank*, 6 A. & E. 952 (E. C. L. R. vol. 33), which may be cited, proceeded on the special principle that it was of great importance to protect the depositors in Savings Banks against the delay and costliness of litigation in the superior courts. Even if it be conceded that sect. 113 does give the Commissioners exclusive jurisdiction over the disputes therein mentioned, the present is not such a dispute; for the company complain of acts merely wrongful; and the section relates to disputes respecting the mode of *129] communicating with the *canal for the purpose of using the water rightfully. Besides, the objection is not open; for the defendants have not pleaded specially that a dispute has arisen under the act. Secondly, the wrongful act necessarily implies damage; for it is a damage to the right; and, according to stat. 46 G. 3, c. xx. s. 23, the use of the canal water for any other purpose than that of condensing the steam of steam-engines is clearly wrongful.

Atherton and Spinks, contrà.—A special plea was unnecessary to inform the Court of a public statute by which its jurisdiction is excluded. The dispute which is the subject of this declaration is one of those mentioned in sect. 113, which are not only disputes with persons desirous of taking water, but also with persons “in the use of taking the same.” The argument from convenience is as strong in the present case as in the Savings Bank cases; for actions must be brought as often as the statute is infringed by the mill-owner, and will produce no permanent result; whereas the Commissioners may prescribe the means of preventing abuses altogether. Generally an action will not lie where another specific remedy is given by statute; *Underhill v. Ellicombe*, M’Clel. & Younge, 450,† *Stevens v. Jeacocke*, 11 Q. B. 731 (E. C. L. R. vol. 63).

Secondly, the declaration does not show any property or possession to enable the Company to maintain the action. The complaint, therefore, is merely of the breach of a statutory provision, which can give no one a right of action. The Company could have no property in the canal under their act without a conveyance; *Doe dem. Robins v. Warwick Canal Company*, 2 New. Ca. 483; even though the act states that

(a) He also obtained a rule nisi for a venire de novo, on the ground that the third breach was bad, as it negatived the proper return of water to the “canal” only, whereas the 113th section used the words “canal and cuts,” and that the general verdict, therefore, on all the breaches, could not stand. It was subsequently arranged that the verdict as to this breach should be entered for the defendants.

purchased lands are *to vest in the Company on payment; Earl of Harborough v. Shardlow, 7 M. & W. 87:† nor, indeed, was it [*130 necessarily to be presumed that any purchase had been made; Hollis v. Goldfinch, 1 B. & C. 205 (E. C. L. R. vol. 8). (a) The water itself, if flowing water, would be publici juris; and the 113th section in itself affords no implication of the Company's ownership of the water. No private right having been infringed, no action lies, and the remedy is by criminal prosecution for a breach of public duty; Chichester v. Lethbridge, Willes, 71, and note (a) p. 74, and authorities cited in the note to the report of that case; Pryce v. Belcher, 4 Com. B. 866 (E. C. L. R. vol. 56).

Again, no private damage is shown; and without that the infraction of even a private right gives no cause of action. The conversion of the water is not the act complained of; nor is it shown that such conversion was any damage to the Company. It is said that, "wherever any act injures another's right, and would be evidence in future in favour of the wrongdoer, an action may be maintained for an invasion of the right without proof of any specific injury;" note (2) to Mellor v. Spate-man, 1 Wms. Saund. 346 b (6th edit.) But this test is in favour of the defendants; for, if the act complained of is expressly prohibited by statute, no repetition of it could ever afford a presumption of its legality. Again, no right can be established by acts done secretly; Partridge v. Scott, 3 M. & W. 220.†

They also contended that the language of the 113th section did not distinctly prohibit the acts complained of, and that, if its language were ambiguous, it should be construed against the Company.

Lastly, the first breach does not allege that the *defendants [*181 either drew the water from the canal, or knew that it was so drawn. The second breach does allege that they drew the water, and, as contended by the Company, for an illegal purpose; and this is the subject of trespass and not case.

They further contended that the defendants were entitled to a non-suit, as no evidence was given of any damage. And that the acts complained of were not wrongful unless they obstructed the navigation, which had been negatived; and also that sect. 113 authorized the use of the water for the "working" of steam-engines generally; and they referred to the second proviso, requiring notice to be given by any person about to take water "for the use of any such engine," in support of this construction.

Lord DENMAN, C. J.—At an early stage of the argument I regretted that we had granted this rule; for I have no doubt that the action lies. I will not inquire whether a special plea was necessary to raise the question whether our jurisdiction is ousted by the 113th section of stat. 34 Geo. 3, c. 78, with respect to the disputes therein mentioned; for I

(a) See Doe dem. The Queen v. Archbishop of York, ante, p. 81.

think it clear that the section refers to disputes respecting the mode of exercising rights as there given, and not to disputes respecting wrongful acts. I am also clearly of opinion that the declaration is good. The Company is invested by the legislature with certain rights, and may maintain an action for an invasion of them. The use of the canal water, by the mill-owner, for any other purpose than the condensation of the steam in his steam-engines, is distinctly treated as an abuse by stat. 46 Geo. 3, c. xx. s. 23, and is, consequently, an invasion of the Company's *132] rights. It is said that the *particular invasion complained of has produced no damage in fact. But some damage must result in such a case; and I cannot acquiesce in the argument that, if the act is clearly wrong, the repetition of it, for whatever length of time, can have no tendency to prejudice the right invaded.

PATTESON, J.—I am of the same opinion. The only difficulty I felt during the argument was, that the declaration is specifically framed on the 113th section of the Company's act, instead of alleging generally that the Company were possessed of the land and water of the canal, and that their right in the property was infringed. Upon this it has been argued that the declaration discloses a breach of a mere public duty, and that, therefore, this action is not maintainable. I think, however, that the objection cannot be sustained. The act allows the owners of land adjacent to the canal to use its water for certain specified purposes, and for those only. The declaration alleges that the canal was made in pursuance of the act, and that the defendants had laid down pipes, lawfully, to communicate with the canal, and ostensibly, therefore, in order to exercise the right of using the water for the purpose allowed by the act; and that, nevertheless, they used the water for a different purpose after it was drawn off, and also drew off more water than was sufficient for that purpose. Upon this it has been argued that the action will not lie, and that the remedy is either by indictment as for a public wrong, or by reference to the Commissioners, to whom jurisdiction over such disputes is given exclusively. Now, if the 113th section ousts the jurisdiction of the superior Courts as to all matters to which the section applies, which I do not concede, I am still of opinion *133] that *it applies only to disputes with persons lawfully exercising the statutory right, and that it does not apply to disputes with mere wrongdoers, who are, as it were, entire strangers. It is said that there is nothing in the declaration to show that the Company had any ownership or possession of the canal, and that it appears merely that they were empowered to purchase land and to make the canal, and that they had made the canal in pursuance of the statute. Now, considering that the statute passed more than fifty years ago, and that it contains provisions to authorize the purchase of land and conveyance of it to the Company, and also the vesting of land in the Company on payment of the purchase-money, it appears rather absurd to suppose that they were

not really proprietors of the canal. The only question is, whether the omission to aver that they were such proprietors makes this declaration bad in arrest of judgment. I think it does not. There is an averment that the canal has been made and maintained by the Company in pursuance of a statute containing the above-mentioned provisions, and also that the defendants gave notice to the Company of their intention to lay down pipes to communicate with the canal in compliance with the provisions that notice of such intention must be given to the proprietors of the canal. I think also that the declaration is good, although no particular damage is averred.

COLERIDGE, J.—I am of the same opinion. First; is the right of action, if any, taken away by the 113th section? That section gives rights, and prescribes the manner of exercising them, and of communicating with the canal, which is necessarily left somewhat at large; and it then enacts that, if any dispute shall arise between *the Com- [*134 pany and persons either desirous of exercising or actually exercising rights, such dispute shall be determined by the commissioners. I think that a dispute with a mere wrongdoer is not within the section, and that our jurisdiction is not thereby excluded. Secondly, does the declaration disclose any right of action? If this were a case between individuals there can be no doubt that the action would lie. But it is said that in the actual case there is no private wrong or private damage. I think we must take it, after the lapse of more than fifty years since the passing of the act which allowed the Company to purchase land and to make the canal, when also we find that they have made and maintained the canal in pursuance of the act, that the Company are to a certain extent proprietors of the canal and its banks, and, for certain purposes, of the water also. The defendants, on the other hand, have by the same statute the right of using the canal water "for the sole purpose of condensing the steam used for working" their steam-engines. The charge is that they have used the water for other purposes. It is said that the section authorized them to use the water for the purpose of "working" their steam-engines generally; and the second proviso is relied upon in support of this construction. According to this argument the proviso, which was meant to restrict the substantive enactment, would have the effect of enlarging it. I think the enactment and proviso are quite consistent, and that the effect of both is to limit the use of the water as contended for by the company; and, if any doubt could be entertained, the matter is, at all events, cleared up by the 23d section of the later statute. The water, then, having been used by the defendants for illegal purposes, the general principle applies, that, although *no appreciable damage may be sustained, in the particular instance, by the wrongful act, yet, as the repetition of [*135 such an act might be made the foundation of claiming a right to do the act hereafter, a damage in law has already been sustained, in respect of

which an action is maintainable.(a) I cannot distinguish the present case from the wrongful use of a way; in either case the wrong tends to the establishment of an adverse right, and is thus a damage to the right.

ERLE, J.—I think, for the reasons already given, that the subject of this action is not a dispute within the 113th section; and I also think, that, if it be so, we have concurrent jurisdiction. Then, as to the objection that the declaration shows no right of action, I am of opinion that the declaration discloses an invasion of a common law right; and that the parties are in the same position as if the declaration had complained of the diversion of a watercourse, and the defendants had pleaded that they diverted the stream for the purposes allowed by the statute, and the plaintiffs had now assigned that the defendants had diverted for other different purposes. Such a company has all the rights and remedies which an individual owner of private property has, unless the statute contains some provision to take them away. Then the question is, could an individual owner of property sue under the circumstances? I am clearly of opinion that he could. It is said that the Company could have no property in the water: perhaps not in the identical passing atoms; but they had in the flow, the *flumen aquæ*.

Rule discharged.(b)

(a) See *Wood v. Waud*, 3 Exch. 748, 772, 3.†

(b) Reported by H. Davison, Esq.

*136] *IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

KING and Another(a) v. The ROCHDALE Company.

[June 18, 1851.]

For marginal note see *antè*, p. 122.

JUDGMENT having been entered up in the preceding case (as to the first and second breaches only),(b) error was brought on the judgment. It was assigned for error (in addition to the common assignment) that the declaration was not sufficient for the Company to maintain the action; and that the matters in the declaration mentioned ought to have been referred to and determined by the commissioners mentioned in stat. 34 G. 3, c. 78, s. 113. Joinder.

Crompton, for the plaintiffs in error,(c) contended, principally, that

(a) The two surviving defendants in the action.

(b) See *ante*, note (a), p. 128.

(c) The writ of error was argued before MAULE, CRESSWELL, and TALFOURD, J., and PARKE, ALDERSON, and MARTIN, B.

the use of the water, as alleged in the declaration, was not prohibited by the Company's statutes. He also cited *Dobson v. Blackmore*, 9 Q. B. 991 (E. C. L. R. vol. 58), to show that the declaration was bad for want of an averment of damage; and Comyns's Digest, *Action upon the Case* (B 6), to show that the form of action should have been trespass.(a) In other respects the argument was, in substance, the same as in the Court below.

**Cowling*, contrà, was stopped by the Court: and *Crompton* [*137 was heard in reply.

PARKE, B., delivered the opinion of the Court that the judgment must be affirmed. He stated that the declaration, which averred that the Company had made the canal in pursuance of the statute authorizing them to make and maintain such canal, and that, before and at the time of the committing of the grievances, the canal was maintained by the Company for the purposes of the statute, sufficiently showed, primâ facie, that the Company were in possession of the canal; that [*138 the statute treats them as proprietors of the projected canal, and it was to be assumed that, as such proprietors, they had all the ordinary rights of proprietorship, except so far as these might be qualified either expressly or impliedly by the provisions of their statutes. That, as to the acts complained of in the declaration, there was a difference of opinion among the members of the Court, on the question whether these acts were prohibited by the former statute; but that the Court was unanimous in opinion that the 23d section of the later act put it beyond doubt that such acts were illegal. Upon the question whether the declaration was good without an averment of damage, he referred to the

(a) In *Rochdale Canal Company v. Walmsley*, decided while the above case was depending in error, the declaration, after expressly averring possession of the canal (being land covered with water) by the Company, and of land by the defendants, with a mill and steam-engine thereon, within twenty yards, &c., and pipes on the said land and mill, alleged, in the first count, breaches similar to those stated firstly and secondly in the above reported case. The second count averred possession of the canal by plaintiffs, and possession by defendant of lands, and a mill and steam-engine thereon, within twenty yards, &c., and alleged that defendant, wrongfully and against the form of the statute, &c., drew and diverted from the canal divers large quantities of water, being more than sufficient, &c.; as in the second breach, above. The defendant demurred specially to both counts. The demurrer was argued in Michaelmas term (November 15th), 1850, by *Crompton* for the defendant, and *Cowling* for the plaintiffs. It was argued for the defendant that the first breach did not show any injury, as the water was lawfully taken, and might, so far as appeared by the pleading, have been returned; and that the mere improper user was not an actionable grievance: or, if the statute made the taking itself illegal when there was an illegal user, the wrong complained of was a trespass. Also, that the breach secondly assigned, and the breach stated in the second count as above, were trespasses, and consequently there was a misjoinder. That the water of the canal was not shown to be running water; and, consequently, as soon as it was illegally made to flow out of that Company's canal into the pipes, a trespass began. It was answered that, even if the water had been returned, which was not to be assumed, the misuse was a breach of the statute, and was an injury in itself, inasmuch as every act tended to establish a right; *Wood v. Waud*, 3 Exch. 748. And that the acts alleged in the second breach and second count did not necessarily imply any trespass, the taking of the water being sanctioned by stat. 34 G. 3, c. 78, and the complaint being only of excess.

The Court (Lord CAMPBELL, C. J., COLERIDGE, WIGHTMAN, and ERLE, J.) held the objections not maintainable, and gave judgment for the plaintiff.

words of the first proviso in sect. 113, "so that no obstruction shall arise therefrom to the said navigation," and observed that they were referable to the legitimate use of the water for condensing purposes only, and introduced to exclude such a mode of returning the water to the canal as might be prejudicial to the navigation. He referred also to *Ashby v. White*, 2 *Ld. Raym.* 938, and said that the declaration disclosed such an injury to a right as might be the subject of an action without express damage. Upon the remaining question, whether the jurisdiction of the Superior Courts was ousted, he observed that the jurisdiction of the Superior Courts was not to be taken away except by express words or necessary implication, and that it did not sufficiently appear that the legislature intended to confer exclusive jurisdiction on the Commissioners even over the disputes mentioned in the 113th section; and that the provision with respect to disputes with a person "in *139] the use of taking the same therefrom" did not extend to disputes with any person who might be in the use of the water for a purpose manifestly illegal, and so a mere stranger and wrongdoer; but that it had the effect of subjecting to the control of the Commissioners a person who had made a communication with the canal without notice, and was in the use of the water for the legitimate purpose of condensing, or, perhaps, a person whose mode of communicating with the canal for that purpose, after due notice and approval by the committee, might be found, after he had entered upon the lawful use of the water, prejudicial to the canal or its banks, or inconvenient to the navigation.

Judgment affirmed.(a)

(a) Reported by H. Davison, Esq.

The QUEEN v. The Trustees of the Vicarage of ORTON. *July 5.*

An advowson was vested in feoffees, in trust, upon every avoidance, to present to the Ordinary such person as should be elected by a majority of the landowners in a parish. On motion for a mandamus to the trustees to present a clerk, on the ground that he had been so elected:

Held,

That either the remedy of the landowners against the trustees was in Equity for a breach of trust, or, if the landowners had a legal right, their remedy was by *quare impedit*; and that in either case the mandamus would not lie.

Held also, that the remedy, if any, of the clerk was in Equity, and that he had no legal right.

BADELEY, in last Trinity term, obtained a rule calling upon the trustees and patrons of the vicarage of Orton, otherwise Overton, in the county of Westmoreland and diocese of Carlisle, to show cause why a mandamus should not issue commanding them to present to the Bishop *140] of Carlisle, as ordinary of the said vicarage, the Rev. George Atkinson, to be admitted, instituted, and inducted into the said benefice.

It appeared from the affidavits on which the rule was obtained, that the advowson was conveyed by deed to certain feoffees, in trust to present to the ordinary such person as the majority of the landowners in the parish should appoint from time to time whensoever the incumbency of the said vicarage should be vacant. At an election of an incumbent to the vacant benefice in April last, a dispute had arisen whether Mr. Atkinson or a Mr. Sisson had the majority of votes. The trustees declared that Mr. Sisson was elected. No presentation had been made; but the trustees had refused to present Mr. Atkinson.

The case was argued during the term.(a)

The Court desired to have the question discussed, whether mandamus would lie in such a case.

Watson and *Manisty* showed cause.—The question submitted to this Court respects the administration of a private trust; and the proper remedy is in equity. Many cases similar to the present have been discussed in the equity courts; *Attorney-General v. Parker*, 1 Ves. sen. 43, *The Attorney-General v. Forster*, 10 Ves. 335, *Fearon v. Webb*, 14 Ves. 13, *Edenborough v. The Archbishop of Canterbury*, 2 Russ. 98, *Davis v. Jenkins*, 3 Ves. & B. 151, 153. The trustees have no public duty to perform; if they neglect to present, the public will not suffer; the only consequence will be a lapse to the Ordinary. But, if there is a legal right in the *case, the remedy is by quare impedit; and mandamus will not lie if there is any other remedy; *Rex v. The Marquis of Stafford*, 3 T. R. 646. *Regina v. Kendall*, 1 Q. B. 366 (E. C. L. R. vol. 41), where the mandamus issued, was the case of a corporate body.

Sir *F. Kelly* and *Badeley*, contra.—Mandamus has issued in many such cases against individuals; *Rex v. Blooer*, 2 Burr. 1043, *Rex v. Baker*, 3 Burr. 1265, *Regina v. Abrahams*, 4 Q. B. 157 (E. C. L. R. vol. 45), which were equally cases of private trust. *Rex v. The Marquis of Stafford*, 3 T. R. 646, is distinguishable; there the nominee was to be allowed as well as presented; before allowance there could be no legal right. [PATTESON, J.—In whom is there a legal right here, and what is the right?] Mr. Atkinson has a legal right to be presented. [PATTESON, J.—In *Regina v. Kendall* there was nothing more to be done than for the master to put the corporate seal as ordered by the corporate body.] The presentation required in this case is a mere ministerial act. It is no answer that there may be an equitable remedy; there is no legal remedy other than by mandamus. *Cur. adv. vult.*

PATTESON, J., now delivered the judgment of the Court.

This was an application for a writ of mandamus to compel certain persons, in whom the legal estate in the advowson of the vicarage of

(a) June 11th. Before Lord DENMAN, C. J., PATTESON and ERLE, Js. COLERIDGE, J., was sitting at Nisi Prius in London.

Orton is vested, to present Mr. Atkinson to the Bishop of Carlisle for institution to that vicarage.

*142] *The affidavits show that the persons against whom the writ is prayed, hold the advowson under a deed, by which it was conveyed to trustees, in trust to present such person as should be elected by a majority of the landowners of Orton: and the dispute is, whether Mr. Atkinson or Mr. Sisson had the majority of votes.

The Court does not enter into any examination of the facts; because we are of opinion that, if the writ of mandamus be the proper remedy, the questions of fact and law arising in this case must be raised by a return to the writ.

But the difficulty is, whether this is a case in which a writ of mandamus ought to issue at all; and that will be found to depend upon whether a writ of quare impedit will lie; for, if it will, all the authorities, except *Clarke v. Bishop of Sarum*, 2 Str. 1082, are against the granting of the writ of mandamus; and that case is considered not to be good law in *Powel v. Milbank*, 1 T. R. 399, 401, note (d), in the note to *Rex v. Bishop of Chester*, 1 T. R. 396. It is quite clear that, when the right of presentation is in one person and the right of nomination in another, the nomination is the substantial right, and the presentation ministerial only. Either of the persons, however, may bring quare impedit. "If he who hath the nomination presents to the ordinary, he who ought to present shall have quare impedit, and e contra." (a) "If respect be had of each other, then are they both patrons after a manner, and by injury offered by every of them to the other, one of them may punish the other. As if he that hath the nomination will present immediately to the ordinary, he that hath the presentation may bring a quare impedit, or a writ of right of advowson against *him, as his case

*143] requires; so if he that hath the presentation refuses to present the clerk nominated to him, or presents one himself without nomination, the other shall bring a quare impedit, or a writ of right against him, and his writ shall be quod permittat ipsum præsentare, &c., but in his declaration he shall declare the special matter;" 17 Vin. Abr. 314, *Presentation* (T). Again, p. 315, pl. 5: "If he that hath the nomination presents to him that hath the presentation, he that hath the presentation may disturb in two manners, either by refusing the person nominated, or by presenting some other himself that is not nominated. If he refuse to present him that is nominated to him, and suit be commenced without any actual presentation made by himself, then the writ to the bishop of him that hath the nomination shall be, that he shall recover his nomination, and that the bishop shall admit such as the other hath nominated to the presentor, according to his grant of nomination; but if the disturbance, upon which the suit is granted, be, because the presentor, that should present the parson nominated, hath presented

some other himself without nomination, then the nominator shall immediately, without any nomination at all to be made to the other that hath the presentation [have writ] to remove the other incumbent." Both passages are cited from Doderidge of Advowsons,^(a) 67, 68, 69. Lect. 12. A case is referred to in Moore, *Ford v. Hoskin*, Moore, 842, in which it is said by the Court, "Si un ad le nomination et un auter le presentation al un advowson, et cestuy que ad le presentation ne voit presenter le party que est nominate, nul action gist." But the Court was there speaking of an action on the case. See Mallory,^(b) 41, [*144 *pl. 12, citing *Sherley v. Underhill*, Moore, 894: "Tout le court fuit d'opinion et direct que le nomination fuit le substance del advowson, et le presentation ne fuit que un ministerial interest. Et si le presentor present sans nomination quare impedit gist: sic auxi si le nominator present immediatè sans presentation quare impedit gist vers le nominator." If the trustees had in this case presented a person not nominated by the landowners, there seems to be no doubt that the latter might maintain quare impedit; and so it was held in the case of *Rex v. Bishop of Chester*, E. 24 G. 3, B. R. (cited in *Rex v. The Bishop of Chester*, 1 T. R. 396); where a mandamus was refused to the inhabitants of Troutbeck, because they might bring quare impedit.

But, as they have not presented any one, some doubt may be raised whether the landowners can sue; and, if they cannot, there is certainly no legal remedy, and a case is fairly made for the interposition of this Court by writ of mandamus; unless the right be merely an equitable one. The passages above cited from Viner's Abridgment are, however, an answer to that doubt. The authorities show that the right of the nominator is not merely an equitable right, but a legal one; otherwise he could in no case maintain quare impedit.

It is, however, found that cases of this sort have always arisen where the right of the nominator has been adverse to that of the presentor, and not where the presentor is a mere trustee for the nominator, as in the present case. Where such is the relation of the parties, the only remedy is in equity: and, therefore, as regards the landowners and the trustees, the former appear to be in the dilemma put by the Court in *Rex v. The Marquis of Stafford*, 3 T. R. 646, 651: if the land-owners have only an equitable right, this Court cannot interfere [*145 at all; if they have a legal right, such right may be asserted in a quare impedit. Upon the same principle this Court acted in *Regina v. The Chapter of Exeter*, 12 A. & E. 512 (E. C. L. R. vol. 40).

But we are told that this application is not made by the landowners, but by Mr. Atkinson, and that he has no other remedy. Many authorities were cited to show that, where a person is nominated to an office by those who have the right to nominate, and no other remedy lies at

(a) Compleat Parson: or a Description of Advowson's, &c.

(b) *Quare Impedit*, part 1.

law, this Court will interfere by mandamus. No doubt that is so. But they are all, with the exception of *Rex v. Bland*, 2 Burn's Ecc. Law, 117, tit. *Dean and Chapter*, IV., and *Regina v. Kendall*, 1 Q. B. 366 (E. C. L. R. vol. 41), instances of writs directed to the persons who are ultimately to admit or restore the applicant, and when everything necessary to give him the legal right to be admitted or restored has been already done. Such are writs of mandamus to swear in churchwardens, to admit a scholar or fellow to a college, to license a curate, to admit a minister to a dissenting chapel, and to admit to many other offices. The right of the party applying in all such cases is complete, supposing the grounds of his application to be established in fact; and the writ goes to those who are bound to put him into possession of the office to which he has shown his right. But in the case of a presentative benefice the intended incumbent has no legal right, whatever, which he can himself enforce even after he is presented; certainly, therefore, none before. If the ordinary refuses to *institute him he can *146] maintain no action in his own name; the action must be in the name of his patron for a disturbance of the temporal right; although, if the objection be personal, he may in many cases sue in the Ecclesiastical Court by duplex querela. No instance is to be found in our books of any attempt by a clergyman, even after presentation, to obtain a writ of mandamus to compel his institution to a presentative benefice; and for this plain reason, that there is a legal remedy open to those who present him by quare impedit, and he has himself no legal right whatever. If then Mr. Atkinson could not, if he had been presented, have applied to this Court for a writ of mandamus to compel institution, how can it be said that he has such a legal right to this vicarage as to be entitled to a writ of mandamus to compel the trustees to present him? If the presentation by the undoubted patron would give him no legal right, how can the nomination of him by the landowners to the trustees, who have the legal title to present, give him any legal right whatever? It is the right of his patrons (the landowners) that is infringed by the refusal to present, and not *his* right; and they must enforce it, not he.

The case of *Regina v. Kendall* remains to be considered. In that case the prosecutor was the clergyman elected by the brethren of an hospital to a vicarage, the advowson of which was vested in the Master and brethren, who were incorporated; and the Master had refused to put the corporate seal to his presentation. The prosecutor had no legal right there any more than Mr. Atkinson has here; the point was *147] *not taken, which is now under consideration, perhaps because it was clear that no writ of quare impedit would lie in that case; and, if the brethren had been the prosecutors instead of the clergyman, the same questions would have arisen. There would have been no doubt of their having a legal right, and of their having no legal remedy,

except by writ of mandamus, to compel the Master to affix the corporate seal to the instrument of presentation. But, whether this was the reason or not, certain it is that no objection was taken as to the want of a legal right in the prosecutor; and the same observations apply to the case of *Rex v. Bland*, 2 Burn's Ecc. Law, 117, which was of a precisely similar nature.

If, therefore, this application be made by Mr. Atkinson, as it is said, we think that he has not shown any legal right on which we can found the writ. Added to which it may be observed that, if, as is most probable, the relation of trustees and cestuis que trust is that which really subsists between the legal owners of the advowson and the landowners in this case, so that the latter have their proper and only remedy in equity, it will follow that the proper remedy for their nominee, who, claiming from them, must be in the same condition as they are, is in equity. If it be made by the landowners, they are in the dilemma above mentioned. If they have a legal right, they can enforce it by *quare impedit*; if they have only an equitable right, this Court cannot interfere.

In any view of the case, therefore, this rule must be discharged.

Rule discharged.(a)

(a) Reported by H. Davison, Esq.

*IN THE EXCHEQUER CHAMBER. [*148

(Error from the Court of Queen's Bench.)

CHARLES WRIGHT v. THE QUEEN.

An indictment for conspiracy alleged that C. died possessed of East India stock, leaving a widow; that defendants, unlawfully, &c., conspired by false pretences and false swearing, &c., unlawfully, &c., to obtain the "means and power" of obtaining such stock: that, in pursuance of such conspiracy, defendants caused to be exhibited in the Prerogative Court of Canterbury a false affidavit made by one of them, in which the deponent stated that C.'s widow had died without taking out administration to C., and that deponent was one of her children: and it then alleged that defendants fraudulently obtained to deponent, as one of the children of C., a grant of administration to his estate. The indictment contained other similar overt acts, and charged that by means of them defendants did obtain the means and power, &c., and did get possession of the said stock.

On motion in Q. B. to arrest the judgment, on the ground that a charge of conspiracy to obtain the "means and power" of obtaining the stock did not describe any offence:

Semble, that the statement of the overt acts done in furtherance of the object of conspiracy was so interwoven with the charge of conspiracy itself as to show an unlawful conspiracy.

But

Held, that, at all events, the overt acts in themselves constituted a misdemeanour, on which the Court could legally pronounce judgment.

Admitted, that a count which merely charged a conspiracy in the same manner without alleging the overt acts was bad.

W., being indicted in Q. B. for a conspiracy, pleaded Guilty; whereupon it was adjudged that he be convicted; and a day was given him, by cur. adv. vult, to hear judgment; and he was

afterwards outlawed for non-appearance. He afterwards came into Court in custody, and brought error in Q. B., assigning error in the record, process, and publication of outlawry, and in pronouncing the judgment of conviction, and praying that the outlawry and conviction might be reversed, and that he might be restored to all he had lost by the outlawry. The Coroner, for the Crown, joined in error, pleading that neither in the record and process, nor in the publication of the outlawry, nor in pronouncing the judgment of conviction, was there error; and praying that the outlawry might be confirmed. It was admitted that the process of outlawry was erroneous. Held, in Q. B.: that it was sufficient to give judgment merely reversing the outlawry, without any notice of the judgment of conviction. Judgment affirmed in Exch. Chamber.

Per Lord DENMAN, C. J.: One of two defendants, convicted of conspiracy, may bring error on the judgment without the other.

The following points were decided by the Court of Exchequer Chamber:

1. W. not having appeared on the day given him to hear judgment (as above), a *capias* issued, which was followed up by process of outlawry. Afterwards the outlawry was reversed, and judgment passed on the conviction. Upon error brought on this judgment, Held that no objection could be taken to want of continuances from the time of the non-appearance to that of the reversal of outlawry, the discontinuances up to the outlawry merely affecting the outlawry, which had been reversed; and no continuances being necessary during the proceeding to, or existence of the outlawry.
2. The record of Q. B. (into which court the indictment had been removed by *certiorari*) commenced "Pleas before," &c. "of the term of Saint Michael, in the 4th year" of W. 4, being the term of the appearance of defendant in Q. B. Then followed regular continuances down to the non-appearance: then the outlawry: and then, after an interval of several terms, an entry "Hilary term in the 9th year of the reign of Queen Victoria," being the term in which the defendant was brought into Court after the outlawry: then an entry "and now, that is to say on the 26th day of January in this same term;" recording the bringing in of the defendant. Held that this was a sufficient commencement of the proceedings subsequent to the outlawry, without a fresh *Placita*.
3. Held also, that it was sufficient for the record to state that the defendant, "being a prisoner in custody by virtue of a warrant theretofore issued upon the said judgment of conviction and outlawry, is brought in custody aforesaid into Court here," without further describing the process under which he was taken.
4. The jury process was made returnable on one of the three days before full term; and on the same day a continuance by new venire was awarded. Held, not erroneous; inasmuch as the return day was conformable to stat. 1 W. 4, c. 3, s. 2, and the Court, though not sitting for the despatch of business before full term, might award the continuances on the return days.
5. That, even if there had been a discontinuance in the jury process, the defendant waived the objection by afterwards pleading Guilty.
6. Two defendants being indicted for conspiracy, one of them cannot, on writ of error, object to a discontinuance in the process against the other.

THE record in the Court of King's Bench was as follows:

*149] "Pleas before our Lord the King, at Westminster, of *the term of Saint Michael, in the 4th year of the reign of our Sovereign Lord William the Fourth, by the grace," &c., "and in the year of our Lord 1833.

"Amongst the pleas of the King, Roll 14.

"Charles Wright and another.

"4th William 4th, 1833

"As yet of Michaelmas term. The King.

"London. Some time ago, that is to say, on Thursday the 17th day of October, in the 4th year of the reign of our Sovereign Lord William the 4th, by the grace," &c., "at the General Session of oyer and terminer of our Lord the King, holden for the city of London, at Justice Hall in the Old Bailey, within the parish," &c., "in London aforesaid, before Sir PETER LAURIE, Knight, Mayor of the city of

London, Sir JAMES ALLAN PARA, Knight," &c., "and others their fellows, justices," &c. (reciting the letters patent), "it was presented in manner and form following; that is to say: London. The jurors," &c. An indictment, against Charles Wright and Sophia Pennell, was then set out.

*The first count stated that, before and at the several times hereinafter mentioned, and on, &c., there was standing in the [*150 books of the United Company of Merchants of England trading to the East Indies, in the name of one Charles Campbell, &c., deceased, a certain interest or share in East India stock, to the extent of 965*l*. of such stock; and there then and there were certain dividends due and payable in respect thereof; that the said Charles Campbell died on 25th May, 1822; and Mary Harriet Campbell his wife survived him and was still living. That Sophia Pennell (defendant) was, and still is, the wife of George Pennell, who is still living. That defendants, well knowing the premises, with force and arms, &c., unlawfully, fraudulently, &c., did conspire, &c., together, by divers false, subtle, fraudulent, and unlawful, &c., ways, means, and contrivances, and by false pretences and false swearing, unlawfully, deceitfully, and fraudulently to obtain *the means and power* to and for S. Pennell of transferring and disposing of the said stock, and also of obtaining payment to her of the said dividends. That, in pursuance of such conspiracy, defendants afterwards, to wit, on, &c., unlawfully, &c., caused and procured a certain false deposition, purporting to have been made on oath by S. Pennell as being a widow, and as one of the lawful children of the said C. Campbell, and wherein S. Pennell falsely stated that the said M. H. Campbell, the widow of Charles Campbell, died without having taken upon her letters of administration of his goods, to be exhibited in the Prerogative Court of Canterbury; and did then and there fraudulently cause and procure such letters of administration to be issued by the said Prerogative Court, purporting to *grant administration of the goods, &c., of C. Campbell to S. Pennell, as one of the [*151 lawful children of the said C. Campbell.

The count (after charging two other overt acts of a similar kind, viz., the procuring, by similar false affidavits, administration to the goods of M. H. C., simply; also administration, with will annexed, of the goods of C. Campbell, left unadministered by M. H. C. as his executrix) proceeded to allege that defendants, in further pursuance, &c., presented, &c., such letters of administration to the said United Company, &c., and *did* then and there, by such false, &c., ways, means, and contrivances, and false pretences and false swearing, as aforesaid, falsely, fraudulently, and deceitfully *obtain the means and power* to and for S. Pennell of transferring and disposing of the said stock; and S. Pennell did transfer and dispose of the said stock for a large sum of money, which she did then and there, by such ways, &c., as aforesaid, unlaw-

fully obtain and receive to and for her own use and benefit. And that S. Pennell did also, by the said false and fraudulent ways, &c., then and there obtain payment to her from the said United Company of the said dividends. Averment: that S. Pennell, during all the times aforesaid, was the wife of the said George Pennell, and who during all the times aforesaid was and still is living, as defendants during all the time aforesaid well knew; that M. H. Campbell during all the time aforesaid was and still is living, as defendants, during, &c., well knew; and that S. Pennell was not the lawful daughter of M. H. Campbell, which defendants at the said several times well knew: *with intention to defraud* M. H. Campbell. To the great damage of M. H. Campbell, &c.

*152] *Second count, the same as the first, only laying the intent to defraud the East India Company.(a)

The third count varied from the first merely in stating fewer overt acts.

The fifth count contained the same inducement as the first, and alleged that the defendants conspired by false, &c., and unlawful ways, means, and contrivances, unlawfully, &c., to cause and procure certain letters of administration, purporting to be a grant of administration, with a certain codicil or confirmation of a will annexed, of the estate and effects left unadministered by M. H. Campbell, as being deceased, of C. Campbell, to her, S. Pennell, as a widow, and as one of the lawful children of M. H. Campbell, as being deceased, for the purpose of obtaining, and with intent then and there unjustly and unlawfully to obtain and receive, the said last-mentioned interest or share of and in the said stock, &c., to and for the use of S. Pennell. (It then set out the same overt acts as alleged in the first count.)

The seventh count stated that M. H. Campbell was beneficially interested in, and entitled to, the stock already mentioned, and that defendants had not any interest therein; and that defendants conspired together by false, &c., and unlawful ways and means, and by false pretences, unjustly and unlawfully to obtain the *means and power* to and for S. Pennell, of transferring and disposing of the said stock, &c.

Ninth count. That defendants, with force and arms, unlawfully, fraudulently, &c., did conspire, combine, *confederate, and agree
*153] together, and with divers other evil disposed persons to the jurors unknown, by unjust, false, fraudulent, and unlawful ways and means to cheat and defraud M. H. Campbell of her moneys, and deprive her of the same, and to injure her, the said M. H. Campbell: to the great damage of the said M. H. Campbell.

Eleventh count. That defendants, on, &c., with force and arms,

(a) The counts were drawn in pairs; the fourth count varying only the allegation of the intent to defraud as laid in the third count, with respect to the person to be defrauded, and so on as to the latter count of each successive pair throughout the indictment.

unlawfully, &c., did conspire, &c., together, by false, &c., and unlawful pretences, &c., unlawfully to obtain and get into their possession, of and from one Samuel Bailey, divers large sums of money, with intent then and there to cheat and defraud the said S. B.: to the great damage of the said S. B.; &c.

The record in this Court, after the indictment, continued as follows.

"Which said indictment our said Lord the King, afterwards," &c. (certiorari to remove into the Court of Queen's Bench). "Whereupon the sheriffs of London are commanded that they cause them to come to answer to our said Lord the King, touching and concerning the premises aforesaid. *And now*, that is to say, on the 2d day of November in this same year, before our said Lord the King at Westminster, cometh," &c.: appearance of C. Wright in person, and of S. Pennell by William Belt her Clerk in Court; pleas by them severally that they are Not guilty; and joinder by *Edmund Henry Lushington*, the King's Coroner and Attorney. "Therefore let a jury thereupon come before our Lord the King on the 8th day of January,(a) wheresoever," &c. "The same day is given, as well to the said E. H. Lushington, who for our said Lord the King in this behalf prosecuteth, as to the said C. Wright and S. Pennell. At which time, to wit, on the 8th day of January (a) aforesaid," &c.; appearance of *E. H. Lushington*, C. Wright in person, and S. Pennell by her said clerk in Court; entry of vicecomes non misit breve. "Therefore, as before," &c.; venire to 12th April,(a) and that day given to the Coroner and both defendants: on 12th April similar appearances and continuances to 19th May; (a) and on 19th May similar appearances and continuances to 3d November.(a) "At which time, to wit, on the 3d *day of November(a) aforesaid," &c.; appearance of the [*154 Coroner, of C. Wright in person, and of S. Pennell by her Clerk in Court. "And the said C. Wright and S. Pennell, having severally withdrawn their pleas by them in that behalf severally above pleaded in manner and form aforesaid, severally say they cannot deny but that they are Guilty of the premises aforesaid, in manner and form aforesaid above charged upon them, and do severally acknowledge and confess the premises as aforesaid in manner and form as in and by the said indictment is alleged against them: and hereupon they severally put themselves upon the mercy of our said Lord the King.

"Wherefore, all and singular the premises being seen and fully understood by the Court of our said Lord the King now here, it is considered and adjudged, by the said Court here, that they the said C. Wright and S. Pennell be severally convicted of the premises above charged upon them as aforesaid: and that for their offences aforesaid they be taken, and so forth. And, because the Court of our said Lord the King now here is not advised," &c.: continuance by cur. adv. vult, and day given to C. Wright, S. Pennell, and the coroner, to 12th January,(b) "to hear their judgment thereupon." "At which time, to wit, on the 12th day of January,(b) before our said Lord the King, at Westminster, come as well the said *Edward Henry Lushington*, who for our said Lord the King," &c., "as the said S. Pennell in her proper person: and the said C. Wright, although being solemnly called, doth not come. Therefore, by the writ of our said Lord the King directed to the sheriffs of London, the said sheriffs are commanded that they take the said C. Wright, if he shall be found in their bailiwick, and him safely keep, so that they may have his body before our said Lord the King on the 12th day of April,(b) wheresoever," &c., "to satisfy our said Lord the King concerning his redemption by reason of the conspiracies and misdemeanors aforesaid, whereof he with another is so indicted and convicted as aforesaid. And, because the Court of our said Lord the King now here is not as yet advised

(a) A. D. 1834.

(b) A. D. 1835.

about giving their judgment of and upon the premises aforesaid, whereof the said S Pennell together with the said C. Wright is so convicted as aforesaid, day is therefore further given, as well to the said *E. H. Lushington*, who for our said Lord," &c., "as to the said S. Pennell, until on the same 12th day of April,(a) before our said Lord the King, wheresoever," &c., "to hear," &c.: "At which time, to wit, on the 12th day of April(a) aforesaid, before our said Lord the King, at Westminster, come as well the said *E. H. Lushington*, who for our said Lord," &c., "as the said S. Pennell in her proper person. And the sheriffs of the said city of London have returned the said last-mentioned writ, so to them directed, endorsed as follows, viz.: 'The within-named Charles Wright is not found in our bailiwick. Alexander Raphael and John Illidge, sheriffs.' Whereupon, by the writ of exigent of our said Lord the *155] King, the sheriffs of *London are commanded that they cause to be exacted the said C. Wright, until he shall be outlawed according to the law and custom of England, if he shall not appear: and, if he shall appear, that then they take him and him safely keep, so that they may have his body before our said Lord," &c., "on the 24th day of May,(a) wheresoever," &c., "to satisfy," &c., "and whereupon the said sheriffs have before returned unto our said Lord the King that the said Charles Wright is not found in their bailiwick. And, because," &c., cur. adv. vult, like the last preceding continuance and day given to the coroner and S. Pennell, to 24th May: (a) appearance on that day by the coroner, and by S. Pennell in her proper person: "And the sheriffs of the said city of London have returned the said writ of exigent, so to them directed, executed and endorsed as follows: that is to say: 'At the Hustings of pleas of land held at the Guildhall,' " &c.; demand and non-appearance of C. Wright on Monday next after the feast of St. Mark the Evangelist, 5 W. 4,(a) and also at the Hustings held on Monday next after the Feast of St. John before the Latin gate in the fifth year aforesaid; " 'And, because there was no other Husting of pleas of land held at the Guildhall aforesaid from the delivery of this writ until the return thereof, we cannot proceed further thereon.' " (Signature of the sheriffs.) "Whereupon, by another writ of exigent of our said Lord the King, the sheriffs of London are commanded that, allowing the two Hustings at which the said C. Wright was demanded and did not appear, as they the said sheriffs before returned to our said Lord the King, they the said sheriffs cause him to be further demanded at their next Husting, and so from Husting to Husting, until he shall be outlawed according to the law and custom of England, if he shall not appear; and, if he shall appear, that then they take him and him safely keep, so that they may have his body before our said Lord the King on the 30th day of October,(a) wheresoever," &c.; continuance as before, and day given to S. Pennell and the coroner to 30th October: (a) appearance on that day by the coroner and S. Pennell; and return of the last exigent by the sheriffs, stating demand and non-appearance of C. Wright, at the several Hustings held on Monday next before the Feast of the Nativity of St. John the Baptist, 5 W. 4,(a) on Monday next after the Feast of the Visitation, 6 W. 4,(a) and on Monday next before the Feast of James the Apostle, 6 W. 4.(a) 'Therefore by the judgment of the Honourable CHARLES EWAN LAW, Recorder of the City of London, according to the custom of the said city, and according to the law and custom of England, the said Charles Wright is outlawed.' " Signature of the sheriffs: continuance, as before, and day given to the coroner and S. Pennell to 8th January.(b)

"And now, that is to say, on the 26th day of January in this same term, before our said Lady the Queen at Westminster, the said Charles Wright, being a prisoner in custody by virtue of a warrant theretofore issued upon the said judgment of con-*156] viction and outlawry, is brought in *custody aforesaid into Court here, and thereupon prays oyer of the record aforesaid; and it is read to him: he also prays oyer of the said first-mentioned writ of *exigi facias*; and it is read to him in these words," &c. The writ was then set out. "Which being read and heard, the

said Charles Wright says that in the record and process, and also in the publication, of the aforesaid outlawry, and in the pronouncing the said judgment of conviction, there is manifest error in this; to wit, that it is not shown, nor does it appear by the return of the said sheriffs," &c.: errors were then alleged in the process of outlawry. "There is also error in this; to wit, that the said process and judgment of outlawry is founded on the said judgment of the said Court of our said Lord the late King, whereby it was considered and adjudged that the said C. Wright and S. Pennell be severally convicted of the premises above charged upon them as aforesaid; and, whereas the charge contained in the eighth and subsequent counts of the said indictment is of too general and vague a nature to warrant or sustain any conviction thereon, therefore in that there is manifest error. There is also error in this: to wit, that the said Court have considered and adjudged that the said C. Wright and S. Pennell be severally convicted of the premises above charged upon them as aforesaid; whereas the said Court should and ought to have considered and adjudged that, as to part of the premises so charged, to wit, the eighth and subsequent counts, the said C. Wright and S. Pennell go without day: therefore in that there is manifest error. Wherefore the said Charles Wright prays *that the outlawry and conviction aforesaid, for the errors aforesaid, and other errors appearing on the record and process aforesaid, may be reversed and held for nothing*; and that he may be restored to the common law and to all which he hath lost by occasion of the outlawry aforesaid, &c. And now, on the same day and year aforesaid, *Charles Francis Robinson, Esq., Coroner and Attorney of our Sovereign Lady the Queen, in the Court of our said Lady the Queen before the Queen herself, being present here in Court in his proper person, and having heard the matters aforesaid above assigned for error, for our Sovereign Lady the Queen saith that neither in the record and process aforesaid, nor in the publication of the aforesaid outlawry, nor in the pronouncing the said judgment of conviction, is there any error: and he prays that the Court of our said Lady the Queen now here may proceed to the examination, as well of the record and proceedings aforesaid, as of the matters aforesaid above assigned for error; and that the outlawry aforesaid may be in all things confirmed.*"

The case on error in this Court was argued in Michaelmas term, 1846.(a)

*Sir John Jervis, Attorney-General, for the plaintiff in error, Wright (defendant below).—The prosecutor does not object to [*157 the reversal of the outlawry, but contends that the indictment cannot be impeached in this proceeding. Now the error alleged is "in the record and process, and also in the publication, of the aforesaid outlawry, and in the pronouncing the said judgment of conviction." Error is assigned expressly on the judgment of conviction; and the prayer is "that the outlawry and conviction aforesaid" "be reversed." Then the Coroner pleads "that neither in the record and process aforesaid, nor in the publication of the aforesaid outlawry, nor in the pronouncing the said judgment of conviction, is there any error." If he had meant

(a) November 18th. In the preceding Easter term (May 5th, 1846), Sir F. Thesiger, Attorney-General, had applied to have the case taken out of its regular place in the Crown paper, and disposed of at once, offering to agree to a reversal of the outlawry, and contending that the plaintiff in error was, at this step, entitled to no more. *Hurlstone*, for the plaintiff in error, contended that the judgment of conviction should be reversed, citing several of the authorities mentioned in the text. The Court (Lord DENMAN, C. J., PATTERSON, WILLIAMS, and WIGHTMAN, Js.) took time to consider, and afterwards directed that the case should come on in its regular order in the Crown paper.

to object to the mode in which the plaintiff in error shapes the objections, he should have demurred. That was done in a case of which the record is in Rastell's Entries, *Error*, plac. 1, fol. 292 b, where, it is true, the Court quashed the writ of error so far as regarded the reversal of the judgment, reversing the outlawry alone. [COLERIDGE, J.—Can we vacate our own record?] It is like an arrest of judgment. In the commentary on Fitz. Nat. Brev. *Writ of Error*, 20 F, note (b), it is said to have been held that the plaintiff in error "might well have a writ of error to reverse both the principal judgment and the *outlawry. 11 H. 4, 66. And may assign error in the principal, *158] before he reverses the outlawry; for by reversing the principal he reverses the outlawry. 11 H. 4, 6. 8 H. 7, 10. 7 H. 6, 44. *Contra*, 7 H. 4, 40." It seems from this that even a judgment of outlawry, good in itself, may be reversed for error in the judgment on which it is founded: and that is reasonable, the outlawry being merely a collateral proceeding to punish the party for avoiding the punishment; and, if the conviction itself be bad, the party ought not to be punished, though the process of outlawry be quite regular: yet that would be the result if the conviction may not be impugned in this mode. Three authorities from the Year-books are mentioned by the annotator on Fitzherbert, as supporting his view. In Yearb. Mich. 11 H. 4, fol. 6 A, pl. 14 (*Tersculard' v. Penros*), error was brought upon a judgment and an outlawry pronounced thereon; and the plaintiff in error attacked the principal judgment: it was objected to this that, although there might be error in the principal record, yet, if the process of outlawry after the judgment were good, the outlawry could not be reversed: but GASCOIGNE (C. J. of K. B.) said that the record and the judgment were the original of the process of outlawry, so that, if there were defect in the original judgment, the outlawry, which depended upon it, was reversible. (a) In Yearb. Trin. 7 H. 6, fol. 44 A, pl. 22, the plaintiff in error was allowed to assign error on the chief judgment as well as the outlawry, though the objection was taken. [COLERIDGE, J.—Could the *159] Court reverse its own judgment in law?] The error there seems to have been error in fact. But in Yearb. Hil. 8 H. 7, fol. 9 B, pl. 2, where error was similarly assigned, it does not appear that there was error in fact. In Coke's Entries, *Det*, fol. 152 b, 157 a, pl. 31, there is a precedent of an affirmance of the principal judgment simultaneously with a reversal of the outlawry. In *Rex v. Wilkes*, 4 Burr. 2527, it was sought to reverse the outlawry for insufficiency in the information as well as error in the process of outlawry: and Lord MANSFIELD delivered his judgment on the objection to the information, adding that, if well founded, it would equally hold upon a motion in arrest of

(a) From the conclusion of this case, Yearb. Trin. 11 H. 4, fol. 94 A, pl. 57, it seems that the outlawry was actually reversed for an error in the chief record.

judgment.(a) In the collection of precedents entitled *Judgments as they were upon solemn arguments given*, &c., pp. 263, 264 (London, 1659), is an entry of reversal of the judgment and outlawry together.

Sir *F. Thesiger*, *contra*.—The reversing of the outlawry is not objected to; and the Court can at present do no more, whatever be the cause of reversal. The assignment of error insists on the supposed insufficiency in the indictment only on the ground "that the said process and judgment of outlawry is founded on the said judgment" of conviction. The prayer of the writ of error is indeed that the "outlawry and conviction" may be reversed; but it concludes with demanding that the plaintiff in error "be restored to the common law and to all which he hath lost by occasion of the outlawry;" and the defendant in error, denying that there is error in the outlawry or judgment of conviction, prays an examination of the proceedings, "and that the outlawry aforesaid may be in all things *confirmed." The question, therefore, referred [*160 to the Court is merely as to the reversal of the outlawry. The defendant in error denies that there is error in either the judgment or outlawry, because the outlawry might be reversed for a defect in either. Even if the parties had pleaded so as to raise a question on the reversal of the judgment of conviction, that would not give jurisdiction. It is true that an error in the judgment in chief may be ground for reversing the outlawry, as is implied by the proceeding in *Rex v. Wilkes*, 4 Burr. 2527, 2553; but that is very different from reversing the judgment. And thus the hardship suggested on the other side could not arise; for, if there were a regular outlawry upon a bad judgment, the outlawry might be reversed, and then the party could be heard to reverse the judgment, or, in this case, to arrest it. In some of the precedents cited on the other side, the writ of error itself seems to have been so framed as to demand a reversal of both the principal judgment and the outlawry. That explains the note (b) on *Fitzh. N. B. 20, F.* [*Lord DENMAN, C. J.*—It seems so: but how could that have been allowed? How could an outlaw, before his outlawry was reversed, be heard for reversing the judgment?] Probably at that time the rule was not established, as now, that an outlaw can be heard only to reverse his outlawry. The case in the note on *Fitzherbert* was a *redisseisin*, where, if the first judgment be reversed, all the proceedings on the *redisseisin* are reversible; 1 *Rol. Abr.* 777, tit. *Error* (F), pl. 1, where also it is said, pl. 3, 4, that the reversal of the original judgment reverses the outlawry, but the reversal of the outlawry does not reverse the *original judgment, citing the first two authorities mentioned [*161 in the note to *Fitzherbert*. The judgment of this Court can be reversed, for matter at law, only (under stat. 11 G. 4 & 1 W. 4, c. 70, s. 8) in the Court of Exchequer Chamber. But, further, here is no judgment, properly speaking, but only a conviction; and error does

not lie till there is judgment on the conviction; *Long's Case*, Cro. Eliz. 489. Further, the conviction is of two: error therefore cannot be brought by one only; 3 Bac. Abr. 68 (7th ed.) tit. *Error* (B).

Sir *John Jervis*, Attorney-General, in reply.—As this record is framed, the Court cannot avoid disposing of the objection to the judgment of conviction. [COLERIDGE, J.—Why so? If we think we can deal with the outlawry only, may we not reverse it for one objection without discussing the others?] In the case in the note to Fitzherbert the inquiry went back one step farther than is here asked; for the judgment in the first action was impeached, though the outlawry was only in the subsequent proceeding, the *redissein*.

Lord DENMAN, C. J.—This is a writ of error to reverse an outlawry. It is admitted that the outlawry must be reversed: but the Attorney-General wishes us to go farther back, and to review the judgment of conviction. This we are not called upon to do, by the writ: nor is the judgment before us for this purpose. In some of the early cases it seems that the Court was called upon to do both; and then perhaps *162] they could not avoid it: though I cannot see how that could be *consistent with the principle that an outlaw can be heard only for the purpose of having his outlawry reversed. For that purpose, no doubt, he is entitled to urge that the judgment is faulty: that was done in *Rex v. Wilkes*, 4 Burr. 2536, 2544: but the result can be nothing beyond a reversal of the outlawry. I wish to observe that I think one of Sir *F. Thesiger's* objections unfounded; namely, that one of several defendants cannot maintain error without joining the others. That is clearly not so. In *O'Connell's case* (a) the several defendants had separate writs of error.

COLERIDGE, J.—On behalf of the plaintiff in error it is urged that a defect in either the judgment or process of outlawry would be sufficient ground for reversing the outlawry, and that therefore he is entitled in this proceeding to call upon us to reverse the judgment. It is also suggested that the defendant has assented to this, by taking issue as to the error in the judgment: but to this I think Sir *F. Thesiger* has given the true answer: namely, that, as a defect in the judgment as well as one in the process of outlawry would warrant a reversal of the outlawry, it was necessary, with a view to the validity of the outlawry alone, to deny that there was error in either. There are two reasons for our not deciding upon the judgment now. First, there are errors assigned besides, upon which we can reverse the outlawry. Secondly, no judgment has yet been pronounced by this Court. There has been only a plea of Guilty, which in its effect is the same as a verdict of Guilty; *163] and then the legal consequence follows, that *the defendants are convicted. The Court has done nothing. If the parties be brought up for judgment, there may be a *nolle prosequi* on some counts

and judgment on counts only which are good. Thus we are called upon to reverse by anticipation a judgment which may be valid. We ought therefore to do only what the writ asks us to do; that is, reverse the outlawry.

WIGHTMAN, J.—I am of the same opinion. It may possibly be necessary sometimes to inquire whether there be error in an original judgment so as to furnish ground for reversing the outlawry. But all that this writ calls upon us to do is to reverse the outlawry. Our judgment can do no more than that: and, if there be any defects for which that must be done, we need not inquire whether there are other defects.

ERLE, J.—The only final judgment which has yet been pronounced is that of outlawry. Are we to reverse judgment on the indictment? The record shows conclusively that there is no such judgment; the Court is not yet advised what judgment to give. The real meaning of the record is, that the defendant has pleaded Guilty, and a *capias* has issued to bring him up for judgment. On that, error cannot be assigned.

The record was continued as follows:

"Whereupon, the Court of our said Lady the Queen, before the Queen herself now here, having seen and fully understood all and singular the premises aforesaid, and having examined and inspected the record and process aforesaid, and also the publication of the aforesaid outlawry and the judgment of outlawry thereon given as aforesaid, as well as the matters above assigned and alleged for error: it appears to the said Court *here that in the record and process of outlawry aforesaid, as also in the said publication and judgment of the said outlawry, there is manifest [*164 error. Therefore it is considered and adjudged by the said Court here that, for certain of the errors above in that behalf assigned, the said judgment of outlawry, in form aforesaid pronounced and had against the said C. Wright, be reversed, annulled, and altogether held for nothing; and that the said C. Wright be discharged from the outlawry aforesaid, and be restored to all things which by reason of the judgment of outlawry aforesaid he has lost."

Sir *John Jervis*, Attorney-General, in Hilary term, 1847, obtained a rule to show cause why the judgment on all the counts except the 9th and 10th(a) should not be arrested. In Trinity vacation (June 30th), 1847,

Peacock showed cause.—Three objections will be taken to the first four counts.

First. It will be said those counts do not show any offence, inasmuch as the conspiracy alleged is to obtain the "means and power" only of transferring stock; and *Rex v. Richardson*, 1 M. & Rob. 402, will be relied on, where it was held that an indictment for a conspiracy to cheat and defraud a party of "the fruits and advantages" of a verdict was too general. But here the counts set out overt acts which of themselves amount to a misdemeanour; for it is averred that the defendants by false depositions obtained the "means and power" of transferring, and

(a) The rule was refused with respect to these.

The case on the rule to arrest judgment is reported by H. Davison, Esq.

that Pennell did transfer, the stock. Even if the defendants had sought to attain some innocent object, it would be an indictable offence to employ false swearing as the means of attaining it. In *Rex v. Eccles*, 13 East, 230, note (d), S. C. 1 Leach, C. C. 274, 4th ed., the indictment stated that the defendants conspired together, by "*indirect*" *165] means" to prevent a *person from carrying on his trade (not stating what those means were); and on motion to arrest the judgment the indictment was held good. That case is supported by *Winsmore v. Greenbank*, Willes, 577, where the declaration charged that the defendant "unlawfully and unjustly persuaded, procured, and enticed" the plaintiff's wife to absent herself from her husband; and it was held unnecessary to state the particular circumstances which made such persuasion and procurement unlawful. So, where a count charged the defendants with conspiring to cause certain goods which had been brought into the port of London from parts beyond seas, and in respect whereof certain duties were payable, to be carried away from the port and delivered to the owners without payment of duties, with intent thereby to defraud the Queen, and did not particularly describe the goods, or the means of effecting the object of the conspiracy, the indictment was held sufficient; *Regina v. Blake*, 6 Q. B. 126 (E. C. L. R. vol. 51). (a) The conspiracy as alleged is not a conspiracy without effect; overt acts are laid; and the allegation of them makes this a good indictment for conspiracy; *Rex v. Spragg*, 2 Burr. 993, 999.

Secondly. It will be objected that the person whom it was the object of the conspiracy to defraud is not distinctly pointed out. But the conclusion of each count alleges an intent to defraud a company or an individual properly described. In *King v. The Queen*, 7 Q. B. 795 (E. C. L. R. vol. 53), (b) where the indictment was held bad, it charged merely a conspiracy to cheat and defraud "certain liege subjects," *being tradesmen, of their goods, &c., without either *166] naming such persons or stating any excuse for not naming them.

The third objection (which is also taken to the fifth and sixth counts) is that it is not stated whose property the stock was. That however is immaterial, since the overt acts charge an indictable misdemeanour.

The 7th and 8th, 11th and 12th counts, as to which, substantially, the same objections are raised, but which state no overt acts, cannot be supported; and, as to those, the rule may be made absolute.

Hurlstone, contra.—First. The conspiracy alleged does not amount to an offence in law. It is difficult to attach any definite legal meaning to a charge of conspiracy to obtain "the means and power" of doing an act. The object of such conspiracy may be perfectly innocent; two or

(a) See *Regina v. Gompertz*, 9 Q. B. 824 (E. C. L. R. vol. 58).

(b) In *Exch. Ch.*; reversing the judgment of the Court of Q. B. in *Regina v. King*, 7 Q. B. 782 (E. C. L. R. vol. 53).

more persons who agree to join in purchasing a gun for the purpose of killing game may, in one sense, be said to have conspired together to obtain the "*means and power*" of committing murder. It is sought to make out an offence by aid of the overt acts: but the gist of the crime is the conspiracy itself. In *Regina v. Kenrick*, 5 Q. B. 49, 61 (E. C. L. R. vol. 48), Lord DENMAN, C. J., said that any combination to prejudice another unlawfully has been considered as constituting a conspiracy: and he added: "The offence has been held to consist in the conspiracy, and not in the facts committed for carrying it into effect." In the present case, if the overt acts show an offence amounting to some misdemeanour, other than a conspiracy, the defendants should have *been indicted for that other offence, and not for a con- [*167
spiracy.

Secondly. The person whom it was the object of the conspiracy to defraud should be shown with certainty. That defect is not cured by the concluding allegation "with intention to defraud," &c.: the rule of law in that respect applies as well to an indictment for a conspiracy as to an indictment for obtaining goods by false pretences; and an indictment for obtaining goods by false pretences was held bad for not stating to whom the goods belonged, though the indictment concluded by alleging an intent then and there to cheat and defraud a person named; *Rex v. Martin*, 8 A. & E. 481. And *King v. The Queen*, 7 Q. B. 795 (E. C. L. R. vol. 53), in which the judgment of this Court in *Regina v. King*, 7 Q. B. 782 (E. C. L. R. vol. 53), was reversed on error by the Exchequer Chamber, is a distinct authority to show that, where an indictment charges a conspiracy to defraud, the individuals to be defrauded must be described by name.

Thirdly. It ought to have been stated to whom the stock belonged. The counts commence by alleging that certain stock was standing in the books of the Company, in the name of a person who is stated to be deceased. *Primâ facie* the property in the stock was in the Ordinary. But it appears from the statement of the overt acts that the deceased had left a will, so that the property in the stock would seem to have vested in an executor. The authorities on this point are collected in *Regina v. Parker*, 3 Q. B. 292 (E. C. L. R. vol. 43),^(a) where an indictment for obtaining goods by false pretences was held bad for *not stating to whom the goods belonged. There Lord DENMAN, C. [*168
J., said: "Although weighty doubts may be stated as to the propriety of requiring particularity in matters which do not affect the question of moral offence, yet it has always been held that the goods must be described as belonging to some party, or that some other description must be given of them, since otherwise the prosecutor might make an indefinite statement, and lie in wait for whatever might come out in evidence."

(a) See *Douglas v. The Queen*, 13 Q. B. 74, 80 (E. C. L. R. vol. 66).

Lord DENMAN, C. J.—I am of opinion that the first six counts may be sustained. The statement of the means used for effecting the object of the conspiracy is so interwoven with the charge of conspiracy as to show upon the face of those counts an unlawful conspiracy. But, if that were not so, the overt acts show an indictable misdemeanour upon which the Court can pronounce judgment.

The rule will be absolute for arresting the judgment on the 7th, 8th, 11th, and 12th counts.

PATTESON and COLERIDGE, Js., concurred.

Rule absolute as to the 7th, 8th, 11th, and 12th counts only. (a)

The record was continued as follows.

"And, because the Court of our said Lady the Queen now here is not as yet advised about giving their judgment of and upon the premises whereof the said C. Wright and the said S. Pennell are so convicted as aforesaid, day is therefore further given, as well to the said *C. F. Robinson*, who for our said Lady," &c., "as to the said C. Wright and the said S. Pennell, until the 11th day of January, in the 10th year of the reign of *169] our Sovereign Lady the Queen, (b) before our said Lady the Queen, at *Westminster, to hear their judgment thereupon, for that the said Court of our said Lady the Queen now here is not as yet advised thereof. At which time, to wit, on the 11th day of January last aforesaid," (b) &c.: appearances of the Coroner, C. Wright, and S. Pennell; and continuance by cur. adv. vult to 15th April, 10 Vict., (b) and the same again to 12th June, 10 Vict. (b) Appearance on the said 12th of June. (b) "Whereupon, all and singular the premises being seen and fully understood by the said Court here, and mature deliberation had thereupon: it is considered and adjudged by the said Court here that the matters charged against them the said C. Wright and the said S. Pennell, and each of them, in and by the 7th, 8th, 11th, and 12th counts of the said indictment respectively, and upon which the said C. Wright and the said S. Pennell have been so found Guilty upon their own confession as aforesaid, and every of them, are not sufficient in law; and that they the said C. Wright and S. Pennell be dismissed and discharged by the Court here altogether of and from the matters therein specified and charged upon them respectively as aforesaid, and that they, the said C. Wright and the said S. Pennell, depart without day in that behalf. And, because the Court of our said Lady the Queen, now here, is not as yet advised about giving their judgment of and upon the matters charged against the said C. Wright and the said Sophia Pennell, in and by the 1st, 2d, 3d, 4th, 5th, 6th, 9th, and 10th counts of the said indictment respectively, and whereof they the said C. Wright and the said S. Pennell are so convicted upon their own confession as aforesaid, day is therefore further given, as well to the said *C. F. Robinson*, who for our said Lady," &c., "as to the said C. Wright and the said S. Pennell, until the 23d day of November, in the 11th year of the reign of our Sovereign Lady the Queen, (b) before our said Lady the Queen at Westminster, to hear their judgment thereupon: for that the said Court of our Sovereign Lady the Queen now here is not as yet advised thereof. At which time, to wit, on the 23d day of November last aforesaid, (b) before our said Lady the Queen, at Westminster, comes the said *C. F. Robinson*, who for our said Lady," &c., "and, the said C. Wright being present here in Court: It is considered, and adjudged, and ordered, by the said Court here, that he, the said defendant C. Wright, for the offence charged upon him in and by the first count of the said indictment, be imprisoned in the Queen's Prison for the space of twelve calendar months now next ensuing; and that he, the said defendant C. Wright, for the offence charged upon

(a) See p. 170, note (a), post.

(b) A. D. 1847.

him in and by the second count of the said indictment, be imprisoned in the same prison for the space of twelve calendar months now next ensuing;" similar judgment on the 3d, 4th, 5th, 6th, 9th, and 10th counts, respectively. "And he, the said defendant C. Wright, is now here in Court committed to the custody of the keeper of the said prison, to be by him kept in safe custody in execution of this judgment."

*The defendant Wright brought error in the Exchequer Chamber. The entry was as follows. [*170

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| <p>" Charles Wright, indicted with another, plaintiff in error, v. The Queen, defendant in error.</p> | } | <p>In the Exchequer, Trinity term, in the eleventh year of the reign of Queen Victoria.</p> |
|---|---|---|

And now, that is to say, on the 26th day of May, in this same term," &c.

The plaintiff in error assigned (besides general error and other grounds which it is not necessary to set out(a)), grounds which, in the corresponding points delivered on his behalf, were stated and numbered as follows.

24. That the *capias* was returnable, and a day given to defendant, on a *dies non juridicus*, viz., 12 April, and this makes a discontinuance.

25. That the first writ of *exigi facias* was awarded on a *dies non*.

26. The like as to the return of the first, and award of the second, writs of *exigi facias*.

27. The like as to the award of the *allocatur exigent*.

28. That there is a discontinuance, no day being given to defendant after 12 January.

29. General assignment of discontinuance.

30. That issue was joined as to whether there was error in the judgment of conviction; but no judgment was given thereon.

31. The like.

The case came on, at the sittings in error after *Michaelmas term, 1848,(b) before COLTMAN, CRESSWELL, and WILLIAMS, Js., and PARKE, PLATT, and ROLFE, Bs. [*171

. *Hurlstone*, for the plaintiff in error (Wright, defendant below).

First, as to the 28th point. It appears by the record (*antè*, p. 155), that, after the return, on 30th October, 1835, of the outlawry, a day is given to the Coroner and the defendant Pennell, to 8th January, 1836. On 26th January, 1836, the plaintiff in error, Wright, is brought in by warrant upon the judgment of conviction and outlawry, and alleges error (*antè*, p. 156); the coroner joins in error on the same day, and, as appears (*antè*, p. 163), by the record (though the fact was otherwise), the outlawry is reversed the same day. No continuance, or further entry, appears till the continuance by *curia advisari vult*, and the day

(a) Among these were grounds relating to the sufficiency of the indictment: but these were abandoned on argument by *Hurlstone*, the judgment being entered separately on each count, and the recent decision of *Regina v. Sydes*, 11 Q. B. 245 (E. C. L. R. vol. 63), supporting the 9th and 10th counts.

(b) November 29th.

given, to 11th January, 1847 (antè, p. 168). That this discontinuance is a fatal error appears from 4 Hawk. P. Cr. 170 (ed. 7), book 2, ch. 27, ss. 87, 88; *Bradley v. Banks*, Cro. Jac. 283, S. C. 1 Bulst. 141; Com. Dig., *Courts* (P 11), *Pleader* (V 1), (V 3), (W 1); 1 Rol. Abr. 484, tit. *Continuance et Discontinuance* (A), pl. 2, 9. The statutes of jeofails do not apply to criminal cases. [PARKE, B., referred to *O'Connell v. The Queen*, 11 Cl. & Fin. 155,(a) and *Johnes v. Johnes*, 3 Dow, 1; and he added that the reason against a discontinuance was that by Magna Charta(b) justice ought not to be delayed. WILLIAMS, J.—Hawkins speaks of discontinuance “after issue or demurrer:” this is a case of *confession: there is no delay of trial. PARKE, B.—Will not *172] delay of judgment raise the objection?]

As to the 24th, 25th, 26th, and 27th points. On 12th January, 1835, the plaintiff in error not appearing, a *capias* issues returnable on 12th April, 1835. On that day the sheriffs return *Non est inventus*, and a writ of *exigent* is awarded returnable on 24th May, 1835. On the day last mentioned, the writ is returned, and an *allocatur* writ of *exigent* is awarded (antè, p. 155). Now, in the year 1835, both the 12th of April and the 24th of May fell on Sunday: and the Courts cannot act on a Sunday; *Swann v. Broome*, 3 Burr. 1595. *Kenworthy v. Peppiat*, 4 B. & Ald. 288 (E. C. L. R. vol. 6), shows that the proceeding is therefore void, and not amendable. In *Morrison v. Manley*, 1 Dowl. P. C. N. S. 773, a *distringas*, returnable on a Sunday, was set aside with costs. The consequence is, that there is a discontinuance on this record from 12th January, 1835, to the return day of the *allocatur exigent*, namely, 30th October, 1835, that is, of two terms, Easter and Trinity. [PARKE, B.—The result of your argument, if correct, would be to make the outlawry void: but that is set aside already. There can be no continuance required in the case of a party while he is outlawed. The question then will be as to the objections to the proceedings subsequent to the reversal.] The case then stood over.

In the same sittings (December 4th, 1848; present COLTMAN, CRESSWELL, and WILLIAMS, Js., and PARKE, ALDERSON, ROLFE, and PLATT, Bs.), the case being called on,

PARKE, B., said: The transcript cannot be faithful. *Let the *173] case stand over and the record be looked at: and, if necessary, an amendment can be made. This, to render the whole correct, must be done in the Court of Queen's Bench; application may be made to the officer of that court. Then we will issue a *certiorari* to bring up the amended transcript. The case then stood over.

Afterwards, on 10th January, 1849, ERLE, J., ordered “that the prosecutors amend the judgment roll, transcript of record, and office

(a) See pp. 251, 325, 404, 405.

(b) Stat. 9 H. 3, c. 29. See *Johnson v. Norton*, 2 Roll. R. 442, 444.

copy thereof, by adding the words 'Hilary term in the 9th year of the reign of Queen Victoria;' and any defect in respect of the continuances; and that the plaintiff in error shall have ten days to new assign errors."

The following amendments were made.

After the day given to 8th January, 1836 (p. 155), and before the entry of the bringing of Wright into court (ib.), was inserted:

"Hilary term in the ninth year of the reign of Queen Victoria." (a)

After the joinder in error in Q. B. (p. 156), and before the judgment of Q. B. on the writ of error (p. 163), was inserted:

"And, because the Court of our said Lady the Queen now here is not as yet advised about giving their judgment of and upon the matters above assigned and alleged for error by the said Charles Wright, day is therefore given, as well to the said *C. F. Robinson*, who for our Lady," &c., "as to the said C. Wright, until the 15th day of April, in the ninth year of the reign of our said Lady the Queen, (a) before our said Lady the Queen at Westminster, to hear their judgment thereupon; for that the said Court of our said Lady the Queen now here is not as yet advised thereof. At which time," &c.: appearance of the Coroner and C. Wright, and continuance by cur. adv. vult in the same form to 22d May, 9th Victoria; (a) the same to 22d November, 10th Victoria: (a) no mention being made in these continuances of the defendant S. Pennell.

*The case was called on, at the sittings in error after Hilary term, 1849 (February 1st), before COLTMAN, MAULE, and WIL- [*174
LIAMS, Js., and PARKE, ROLFE, ALDERSON, and PLATT, Bs.

Hurlstone, for the plaintiff in error, stated that the defendant in error had amended, but the plaintiff in error contended that there was still error, and had assigned errors anew; that there had been no certiorari; and that there was no new joinder in error.

Forsyth, contra, stated that the judgment roll itself had been amended; that the new assignment of error contained merely what had been contained in the original assignment in this Court, with some amendment: and that therefore the defendant in error chose to abide by the original joinder.

PARKE, B.—There is authority for bringing up the transcript without a certiorari: but there must be a fresh joinder.

The case then stood over.

The Crown having joined in error, the case came on for argument during the sittings in error in the present vacation (June 18th), before COLTMAN, MAULE, CRESSWELL, and WILLIAMS, Js., and PARKE, ALDERSON, ROLFE, and PLATT, Bs.

Corner, for the plaintiff in error.—There are still discontinuances on the record. First: It now appears that Wright is brought into Court, "in custody by virtue of a warrant theretofore issued upon the said judgment of conviction and outlawry," "on the 26th

*175] "day of January in this same term." Now the record commences in Michaelmas term, 4 W. 4, 1833; and the words "this same term" properly refer to that. It is true that there is now a heading to this part of the record, "Hilary term in the 9th year of the reign of Queen Victoria:" but that is not so regularly a part of the record itself as to cure the objection. There should have been a fresh placita. Secondly: The record in this part does not show under what process Wright is brought into Court. It is said only that he is in custody under a warrant upon the judgment of conviction and outlawry. Now, in case of outlawry, the proper process is *capias utlagatum*, as in *Rex v. Morley*, Trem. Pl. Cr. 280, 282: and the record ought to show that that was the process here. He comes in to reverse the outlawry: but "a man who is outlawed cannot come gratis without day in Court, and plead a plea in the discharge of the outlawry;" 5 Vin. Abr. 475, *Continuance and Discontinuance* (C 5) pl. 5, citing Bro. Abr. *Jours & Jour in Court*, pl. 80.(a) Thirdly: The continuance, after the joinder in error in the Court below, by cur. adv. vult, to 15th April, 9 Vict., gives a day to the Coroner and to Wright only, omitting all mention of Pennell, the other defendant below: and, as to her, there is no entry before that of 22d November, 10 Vict. (pp. 173, 168), on which day the outlawry is reversed, and a day is then given to the two, namely, 11th January, 10 Vict. As to Pennell, therefore, there is clearly a discontinuance: and this works a discontinuance as against Wright also; 5 Vin. Abr. 485, *Continuance and Discontinuance* (F), pl. 1, 11, 13, where the law is so laid down as to an action *of trespass; and *176] it applies a fortiori to a criminal charge of conspiracy, where the charge fails unless brought home to the two. [PARKE, B.—Two must be shown to have joined in the conspiracy; but it is not necessary that both should be defendants: and, where they are so, they may be tried at different assizes.] Fourthly: By stat. 1 W. 4, c. 3, s. 2, writs may be made returnable on the third day exclusive, or any later day (not being Sunday), before the commencement of each term, and the appearance shall be the third day exclusive after the return, except in the case of Sundays. But the three days previous to the first day in full term are not considered as part of the term; Tidd's New Practice, 43; and on those days the Court can therefore do nothing. Now here the *venire facias juratores* is made returnable on 8th January, 1834, 12th April, 1834, 19th May, 1834, which is in conformity with the statute, so far as the return is concerned: but on those same days the Court awards a new *venire*, which could not be done except in term. The same objection applies to the proceedings on 12th April, 1835, on 24th May, 1835 (for Trinity term in 1835 began on 26th May), and on 30th October, 1835. The effect of this is that several terms are entirely missed. Fifthly: The discontinuances noticed in the former argument

(a) See Proceedings against Sir Thomas Armstrong, 10 How. St. Tr. 105.

in this Court, in respect of the process awarded on Sundays, have not been cured by the amendment.

That these discontinuances are ground of error appears by many authorities; Com. Dig. *Courts* (P 11), *Pleader* (V 1), (V 3), (W 1); 1 Rol. Abr. 485, tit. *Continuance & Discontinuance* (B), pl. 1; 5 Vin. Abr. 457, *Continuance and Discontinuance* (A), pl. 25. Nor is this cured by retraxit, or by any pleading over, *though it is otherwise as to a miscontinuance, which is only a continuation by [*177 wrong process; *Bradley v. Banks*, Cro. Jac. 283, S. C. 1 Bulstr. 141, 143, 5 Vin. Abr. 470, *Continuance and Discontinuance* (B 2) pl. 13.

Further: error is assigned below on the judgment of conviction and outlawry: and on this issue is joined: but the judgment of the Court below is only that there is error in the record and process of outlawry, and in the publication and judgment of the outlawry; and the judgment of outlawry alone is reversed "for certain of the errors above in that behalf assigned." It does not appear that there is any judgment on the errors assigned on the judgment of conviction.

Forsyth, contrâ.—Several of the objections taken do not appear in the assignment of error. "In a writ of error it is no good assignment of error, *quodd in omnibus erratum est*; for the Court is not bound to inquire of the errors, if the party does not show them;" 3 Bac. Abr. 101 (7th ed.), tit. *Error* (K) 1, citing Yearb. Mich. 6 Ed. 4, fol. 6, pl. 16,(a) 1 Rol. Abr. 761, tit. *Error* (D), pl. 2, Bro. Abr. *Attaint*, pl. 86. [PARKE, B.—Under the general assignment of error any objection may be taken.]

The discontinuance fourthly objected to, occurs in the *record [*178 before the retraxit and plea of Guilty, and is cured by the confession on the record. As to the second objection, it is immaterial how Wright came into court for the purpose of reversing his outlawry: he might come in ore tenus: and it cannot be necessary to have any continuance at all during the outlawry: at any rate, the effect will be only to make the proceedings from the confession up to the reversal of the outlawry bad: and these are proceedings affecting merely the outlawry: if they are bad, the only effect is to make the outlawry bad; and that is reversed already. "It seems agreed, as a general rule, that a man cannot reverse judgment for error, unless he can show that the error was to his disadvantage;" 3 Bac. Abr. 105 (7th ed.), tit. *Error* (K) 4. This last answer meets also the fifth objection as to discontinuance. As to the discontinuance first suggested, the heading "Hilary term in

(a) The reference appears to be made to a remark of counsel (*Sulyard*) in fol. 6, A, which is qualified by MARKHAM, C. J. of K. B., who says: "si le pl' assigna un error nient obstant q il n'est error, si le court trouve autres errors, des queux le party ne parle riens, uncore ils doivent reverser le judgment." The passage from Rolle, cited in the margin of Bacon, refers to the same authority; and so does that from Bro. Abr., which last, however, refers exclusively to the question directly discussed in the Yearbook (the form of a writ of attaint), and not to the mode of assigning error.

the 9th year of the reign of Queen Victoria" sufficiently alleges the term to which the proceedings immediately following belong: and the plaintiff in error heads his assignment of errors in this Court in the same way. [PARKE, B.—The entry of the bringing into Court could not be headed "as yet of Michaelmas term," because it is a fresh term: so the new title of the new term is inserted. Certainly we should require some authority, to show that this is wrong.] As to the discontinuance thirdly suggested, it becomes immaterial by both parties having, at an earlier step, pleaded Guilty. A confession on record is at least as strong as a verdict of Guilty. After that, it was not necessary to give a day to either in the court below. In *Lakins v. Lamb, Cro.*

*179] *Car. 235*, quare impedit was *brought against two: one pleaded to issue, and a verdict was found against him: the other pleaded a plea which was demurred to, and a day was given to him and continuances entered as to him up to the judgment, which was given in the second term after the verdict; but no continuances were entered between the verdict and the judgment as against the other, though the judgment was upon both the demurrer and the verdict: and the Court held this to be no discontinuance, for "no day shall be given to a defendant against whom a verdict was found. For he hath no day in Court to plead anything." And, even if this were a discontinuance in respect of Pennell, it would not be so in respect of Wright, who is the only plaintiff in error. In *Bro. Abr. Discontinuance de proces*, pl. 55, it is said: 'Trespas against two, and process is continued against one and not against the other; this is not discontinuance against the other (evidently meaning the former.(a)) So, "if a man brings debt against two by several præcipes, if the process be discontinued against one, it shall not be a discontinuance against the other also;" 5 *Vin. Abr.* 485, *Continuance and Discontinuance* (F) pl. 4. It may be otherwise where the judgment must be joint: but this is a criminal proceeding; the parties might be tried separately; it is as if there were two indictments.

Corner, in reply.—The authorities cited before show that the discontinuances are not cured by confession. It is, no doubt, a rule that a plaintiff in error cannot complain of that which is to his own advantage: *180] but *that rule relates to his own acts, not to those of the Court.

Cur. adv. vult.

PARKE, B., in this vacation (June 15th, 1849), delivered the judgment of the Court.

In this case the objections, on the part of the plaintiff in error, to the indictment itself were withdrawn, and properly, in consequence of the decision in the case of *Sydserff v. The Queen*, 11 Q. B. 245 (E. C. L. R. vol. 63): and the argument proceeded entirely upon objections to the form of the record.

The principal one was to the uncertainty, on the face of the record,

(a) See *Yearb. Pasch.* 22 Ed. 4, fol. 3 B, pl. 12.

of the state of the proceedings which took place at the defendant's coming into Court to reverse the outlawry. That objection has been removed by an amendment in the Court of Queen's Bench, stating those proceedings to be of Hilary term 1846. For we all think that the form adopted, of heading the narrative of those proceedings with the date of the term, is sufficient, without the more formal heading which is termed "placita," and with which the whole record commences.

It was still, however, contended, by the learned counsel for the plaintiff in error, that the record was erroneous; and many other objections were taken, and ably supported on the further argument before us. These were, chiefly, that the continuances were defective, and that, no discontinuance or miscontinuance being cured by the statutes of jeofails (which do not extend to criminal cases), the judgment ought to be reversed.

*One of these objections was, that the continuances as to Mrs. Pennell were wrong, and that, as she was jointly indicted with the plaintiff in error, he had a right to say that the record was erroneous as against himself. But the learned counsel was not able to cite any authorities to that effect in a criminal case, which is divisible; for one may be tried at a different time from the other (*Rex v. Mawbey*, 6 T. R. 619, 638): and, in the absence of authority to the contrary, we all think that we cannot take these objections into consideration for the benefit of the defendant Wright, who alone brings his writ of error.

We therefore confine ourselves to those which arise on the proceedings against the plaintiff in error.

It was contended, that continuances between the *capias pro fine* issued against Wright in Hilary, 1835, and his appearance in Hilary, 1846, by regular notices of a *dies datus* to each (or at least to the Coroner and Attorney of the Crown), were necessary. We are clearly of opinion that they were not. After the contempt of the defendant, and during the proceedings to outlawry, and whilst the outlawry continued, the suit was suspended; and it would be idle to give the defendant a day, or to give one to the Coroner and Attorney on a speculation that the defendant might be amenable to justice on a future day. See the judgment of Lord MANSFIELD in *Rex v. Wilkes*, 4 Burr. 2531.

Next, it was said that the defendant ought to have been brought into Court on the *capias utlagatum* to reverse the outlawry, and that being brought into Court simply was not enough. It appears from the *authorities that this is the regular course; *Milna v. Browne*, 2 Dyer, 192 *b*, (a) is to that effect, and Br. Abr., *Proces*, 80. This is explained, in Lord MANSFIELD's judgment in *Rex v. Wilkes*, to be the practice; but he states that it is in the power of the Court to dispense with it, and allow the defendant to appear gratis: and, if so, an appear-

(a) See Bro. Abr. *Utlagarie*, pl. 26 (bis).

ance gratis cannot be erroneous ; a fortiori one when he is in custody cannot be so.

Another objection was that the continuance of the jury process was erroneous. The venire was made returnable on the 12th April, 1834, which was the third day before the commencement of term, which is right. And the record proceeds to state that on that day the Court awarded another venire, on the suggestion of Vicecomes non misit breve. That day, it is contended, was out of term, and that it was not competent for the Courts to act upon that day, even in awarding process in continuation. But, although that day is not considered as term for the purpose of sitting for the despatch of business (Tidd's New Practice, p. 43), we think that it is still part of the term for the purpose of awarding process in continuation of former process, as the essoign day of the term appears to have been before ; and therefore there is no discontinuance of the jury process at all.

But, if this be not so, we think that there is no objection in the present case ; for, supposing that a trial had been had and judgment was to be pronounced on the verdict, and that discontinuance might have *183] been a fatal objection, in this case, the defendant having *appeared and waived his plea and confessed the indictment, the validity of the judgment in no wise depends upon the regularity of proceedings towards trial. It rests on the defendant's confession alone, made on his appearance in Court, and a retraxit of his plea. We have carefully searched through the various authors on the subject of discontinuance ; and we find none applicable to such a case as this : and, not finding any authority to the contrary, we do not see how a defect in proceeding to trial, that proceeding having from the defendant's solemn act on record become wholly immaterial, can affect the validity of the judgment.

And therefore we think the judgment should be affirmed.

Judgment affirmed.

END OF TRINITY VACATION.

CASES

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

Michaelmas Term and Vacation,

XIII. VICTORIA. 1849.

The Judges who usually sat in Banc in this Term and Vacation were

COLERIDGE, J.

ERLE, J.

WIGHTMAN, J.

Lord DENMAN, C. J., was absent during the whole Term and Vacation, on account of ill health.

MEMORANDA.

Mr. Justice COLTMAN died in last Trinity vacation, July 11th.

In the same vacation

Thomas Noon Talfourd, Esq., Serjeant at Law, was appointed one of the Judges of the Court of Common Pleas. He afterwards received the honour of knighthood.

***185] *The Duke of BRUNSWICK and LUNEBERG *v.* HARMER.**
Nov. 2.

The first count, in an action for a libel, was in respect of a newspaper published more than seventeen years before action brought. The Statute of limitations being pleaded: Held, that the plea was negatived by proof that a single copy had been purchased from defendant for plaintiff, by plaintiff's agent, within the six years.

Other counts were in respect of other libels, alleged to impute to plaintiff the libellous matter charged in the first count, which was set out by way of inducement in each count. The libels themselves, in these other counts, did not refer to that in the first count. The statute of limitations was pleaded to so much of these counts as related to the matter in the first count. Held, that the plea was negatived as to these counts also; and, further, that it was not necessary to tell the jury, in estimating the damages as to such matter, to take into consideration the fact that the only publication proved had been the sale to the agent.

CASE. The declaration was dated 27th April, 1848. The first count stated that defendant, to wit, on 19th September, 1830, falsely, wickedly, and maliciously did print and publish, and cause and procure, &c., in a newspaper called *The Weekly Dispatch*, a false, &c., libel, containing the false, &c., matter following, of and concerning plaintiff, that is to say, &c. (setting out the alleged libel).

Count 2. And whereas defendant, heretofore and before the commission of the grievances by defendant in this count hereinafter mentioned, to wit, on 19th September, 1830, defendant then being the proprietor of the said newspaper called *The Weekly Dispatch*, "had falsely, wickedly, and maliciously printed and published, and caused," &c., "in the said newspaper called," &c., "of and concerning plaintiff, the false," &c., "matter following, of and concerning the plaintiff: that is to say:" The count then set out a part of the libellous matter contained in the first count. "And the plaintiff in fact saith that the defendant, further contriving," &c., "to injure the plaintiff, and to cause it to be suspected and believed that the plaintiff had been guilty of the said acts of oppression and outrage in *the inducement of this count set forth, here-
 *186] tofore, to wit, on the 26th day of September, A. D. 1847, falsely," &c., "did print and publish, and cause," &c., "in the said newspaper called *The Weekly Dispatch*, of and concerning the plaintiff, a certain other false," &c., "libel, containing, amongst other things, the false," &c., "matter following, of and concerning the plaintiff: that is to say:" a fresh libel was then set out, which made no reference to that in the first count; but to one of the imputations in the libel in the second count there was the following innuendo: "thereby meaning that the plaintiff had been guilty of the acts of outrage and oppression in the said first count, and in the inducement of this count, set forth, and of such acts of outrage and oppression as justified his deposition by his subjects."

There were a 3d, 4th, and 5th count, each of which, so far as relates to the point decided, was framed like count 2.

Plea 1. As to the grievances in the declaration mentioned, as far as

the same relate to the printing or publishing, or causing, &c., in the said newspaper, the following matter, that is to say, &c. (the libel in the first count was then set out): so far as such grievances relate respectively to the printing and publishing, or to the causing, &c., any part of such matter: That the several grievances, &c.: statute of Limitations.

Replication: That the several grievances in that plea mentioned, and each and every of them, were committed by defendant within six years next before the commencement, &c. Issue thereon.

Plea 2. To counts 2, 3, 4, and 5, Not guilty. Similiter.

*On the trial, before Lord DENMAN, C. J., at the sittings in Middlesex after last Trinity term, the publication of the num- [*187
bers of the newspaper by the defendant was proved. As to the first plea, so far as related to the first count, two copies of the newspaper containing the libel set out in that count were produced. It appeared to have been published in 1830. One copy was from the British Museum: the other had been purchased, before the commencement of the action, in 1848, at the newspaper office of defendant, by a witness who, on cross examination, stated that he had been sent by plaintiff to make the purchase, and had handed the paper, when purchased, to plaintiff. For the defendant it was contended that this was not such a publication as would support the issue taken by the plaintiff on the first plea with respect to the first count. The Lord Chief Justice overruled the objection. The defendant's counsel then contended that at any rate, the jury should be told to exclude the libel in the first count from consideration in estimating the damages, except so far as they thought the plaintiff was injured by a republication, at his own request, to his own agent, in 1848, of a libel which had been originally published in 1830. The Lord Chief Justice declined so to limit them: and the jury found a general verdict for 500*l*.

Sir *F. Thesiger* now moved (a) for a new trial on the ground of misdirection and of excessive damages; and also upon affidavit.—This being a civil action, in which the plaintiff complains of being injured by the publication, no publication which he has intentionally *caused can [*188 support the complaint. It would be otherwise in the case of an indictment, where the question would be, whether the public had been injured by an act tending to provoke a breach of the peace. The publication proved was, in law, a publication to the plaintiff himself, which cannot be the foundation of a civil action. Nor is this like the case of a newspaper lately published, where, from a single publication on a particular day, it may be inferred that the newspaper has been recently in circulation elsewhere.

At all events, the damages for such a publication ought to have been

(a) Before COLERIDGE, WIGHTMAN, and ERLE, Js.

very trifling; and the jury should have been told so. As it is, the damages may have been given as largely as if the newspaper of 1830 had been recently circulated. *Cur. adv. vult.*

COLERIDGE, J., in this term (November 16th), delivered the judgment of the Court.

In this case we reserved for consideration two points on which it was urged that Lord DENMAN had misdirected the jury; and also the question of excess of damages.

As to the first, Sir *Frederick Thesiger* contended that Lord DENMAN should have told the jury no publication of the libel in the first count was proved within six years. It appeared that the publication relied on was a sale of a copy of the newspaper to a person sent by the plaintiff to procure it, who, on receiving it, carried it to the plaintiff. It was said that this was a sale to the plaintiff himself, and, therefore, not a sufficient publication to sustain a civil action for damages. And, *189] in some sense, it is true that it was a *sale and delivery to the plaintiff: but we think it was also a publication to the agent. The question arises as on a plea of Not guilty in an ordinary case. The defendant, who, on the application of a stranger, delivers to him the writing which libels a third person, publishes the libellous matter to him, though he may have been sent for the purpose of procuring the work by that third person. So far as in him lies, he lowers the reputation of the principal in the mind of the agent, which, although that of an agent, is as capable of being affected by the assertions as if he were a stranger. The act is complete by the delivery: and its legal character is not altered, either by the plaintiff's procurement or by the subsequent handing over of the writing to him. Of course that this publication was by the procurement of the plaintiff is not material to the question we are now considering.

Sir *Frederick Thesiger* urged, secondly, that, in directing the jury as to the damages, Lord DENMAN should have expressly cautioned the jury to limit the amount to be given on this count to what injury they might believe to have been occasioned by the single publication proved. This, of course, would have necessitated the separation of the damages given on this count from those on the other counts, which were for other libels: and this, in the present instance, was scarcely possible, as some of the latter counts referred to, and in some sense incorporated, the libel in the first count with those for which they were themselves framed. But we know no reason why the ordinary rule should not have been pursued in this case. We have no doubt the jury were sufficiently *190] informed as to the peculiar circumstances of the case; and, *considering these, and the nature of the libel itself, they were to draw their conclusion as to the amount of injury resulting, and the proper compensation to be given.

We see no ground, therefore, on either point, for thinking there was any misdirection.

As to the damages, Lord DENMAN is not dissatisfied with the amount : and, on reading the libels, we entirely agree with him.

There will be no rule, except on the affidavits.(a)

Rule granted on the affidavits only.

(a) As to the rule on the affidavits, see note (a) to Re Lloyd, 15 Q. B. 682 (E. C. L. R. vol. 69).

PRATT v. HANBURY. Nov. 3.

To a count for false imprisonment, defendant pleaded that his goods had been stolen by a person unknown to him; and that he had probable cause for suspecting plaintiff to have been guilty of the felony; also, that the goods had been stolen by a person unknown, and plaintiff had feloniously and knowingly received them: also, that a person unknown had feloniously received, and defendant had probable cause to suspect plaintiff of having been guilty of and concerned in the felonious receiving.

In support of these averments, proof was offered that the goods had been, in the first instance, stolen or received by P., a person known to defendant. The Judge amended the pleas, substituting P., by name, for the person unknown.

The Court, under stat. 3 & 4 W. 4, c. 42, s. 23, refused a rule for a new trial.

Though it was suggested that the person named had been tried for the felony and acquitted.

TRESPASS. The first count charged an assaulting of defendant, imprisoning him without reasonable or probable cause, and compelling him to go to a police office. There was a second count, not material to the point now decided.

Pleas to first count. 1. Not guilty. Issue thereon.

2. That, before the committing, &c., to wit, on, &c., *certain [*191 goods and chattels, to wit, one cask containing divers, to wit, fifty gallons of ale, of defendant, of great value, &c., to wit, 10*l.*, were "feloniously stolen, taken, and carried away by *some person or persons who were and are to the defendant unknown.*" That afterwards, and before the committing, &c., to wit, on, &c., "the said goods and chattels, to wit, the said cask of ale, which had been and was so feloniously stolen, taken, and carried away as aforesaid, were found and discovered to be, and the same then were, without the defendant's knowledge, privity, or consent, in the dwelling-house of the plaintiff, in which he then was residing and being, to wit, a certain public-house, called," &c., situate, &c. "That, after the said goods and chattels, to wit, the said cask of ale, were so discovered as aforesaid in the said plaintiff's said dwelling-house, and before any of the said times, when, &c., in the said first count mentioned, to wit, on," &c., "the said plaintiff, in conversation," &c.: circumstances of suspicion were then set forth. "Therefore the defendant says that he, the defendant, having, before the committing," &c., "good and probable cause to suspect, and vehemently suspecting, the plaintiff to have been and to be guilty of or concerned in the said

felonious stealing, taking, and carrying away of the said cask of ale, and to have feloniously stolen, taken, and carried away the same, did, at the first of the said times when, &c., cause the plaintiff to be arrested," &c.: stating that the defendant was given in charge to a police constable, taken before a magistrate, and committed for trial. Replication: *De injuriâ*. Issue thereon.

*192] 3. Averment of the stealing by a person unknown, *as before, and that plaintiff "did feloniously receive and have the said goods and chattels, he, the plaintiff, then well knowing them to have been so feloniously stolen," &c.: "whereby the plaintiff was guilty of felony," &c.: justification as before. Replication, *De injuriâ*. Issue thereon.

4. Averment of the theft (not stating by whom), and that a person, to defendant unknown, did feloniously receive the goods, &c.; and they were, without defendant's knowledge, in plaintiff's dwelling-house; stating circumstances of suspicion; wherefore defendant, having good and probable cause to suspect, and vehemently suspecting, the plaintiff to have been guilty of, or concerned in, the said felonious receiving and having of the said cask of ale so feloniously stolen, taken, and carried away as in this plea aforesaid, and of having feloniously received the same well knowing it to have been stolen, did," &c.: justifying as before. Replication: *De injuriâ*. Issue thereon.

Justifications were also pleaded to the second count: to which *De injuriâ* was replied: whereon issue was joined.

On the trial, before Lord DENMAN, C. J., at the Middlesex sittings after last Trinity Term, it appeared that a cask of ale belonging to the defendant, who was a brewer, had been left at the house of the plaintiff by a person named John Press, who was in the employ of the defendant and well known to him; and that, this becoming known to the defendant, the house was searched, and the cask was discovered under circumstances which, as was contended for the defendant, justified the suspicion that Press had stolen the cask and that the defendant either was a party to *193] the felony *or had knowingly received the stolen property. The plaintiff had been charged with the offence, committed for trial, and tried for felony at the Central Criminal Court, and acquitted. For the plaintiff it was contended that, as the supposed felony had been committed by a person known to defendant, the pleas of justification were not supported. Defendant's counsel proposed to amend, by substituting, for the words "some person or persons who were and are to the defendant unknown," the words "one John Press." This was objected to by the counsel for the plaintiff; but the Lord Chief Justice, after argument, directed the amendment to be made. The Jury found a verdict for the defendant on the pleas of justification to the first count, and also on pleas to the second count.

James now moved for a new trial.—The amendment was not war-

ranted by stat. 3 & 4 W. 4, c. 42, s. 23, empowering the Judge to amend in any particular "not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action," &c. Here the plaintiff was prejudiced. Had the name of Press been on the record when the issue was made up, the plaintiff might have been prepared with proof that Press had been acquitted.^(a) [ERLE, J.—Would that have been admissible? It is a record inter alios. COLERIDGE, J.—There is no allegation in the declaration that the party unknown had been convicted.] At all events, any evidence which the defendant gave against Press on the trial for larceny would have been evidence in this *case. [*194 [WIGHTMAN, J.—The defendant might in this action have proved the fact of a theft by Press, notwithstanding his acquittal.] The acquittal would have been evidence in aggravation of damages. [COLERIDGE, J.—Was the charge made against the plaintiff after Press's trial?] No. The plaintiff might have been prepared with evidence to prove Press's innocence. The material cases on amendment are collected in 1 Taylor on Evidence, 152, &c. In David v. Preece, 5 Q. B. 440 (E. C. L. R. vol. 48), the plea was that the plaintiff, who sued on a promissory note, had accepted, in satisfaction of that note, another note with an additional party: it appeared that the note last mentioned had been given in satisfaction, not of the note declared on, but of a third note, which had no additional party, and which had been given in satisfaction of the note declared on. The Judge amended the plea according to the facts: but this Court held the amendment not to be warranted, inasmuch as it introduced a transaction entirely different from that described in the plea. That is so here: and the misstatement was calculated to mislead the plaintiff. Press was known to all parties: the allegation in effect is, that the theft had been committed by some person other than Press. John v. Currie, 6 C. & P. 618 (E. C. L. R. vol. 25), and Bowers v. Nixon, 2 Car. & K. 372 (E. C. L. R. vol. 61), are authorities against the amendment.

COLERIDGE, J.—I think there ought to be no rule. The statute was intended to enlarge the power of the Judge at Nisi prius; and it gave him a discretion as to the extent of the amendment. I doubt whether the proviso at the end of sect. 23, allowing an application *to the Court by a party dissatisfied with the amendment, was intended [*195 to control the discretion of the Judge. It rather seems that the Court, on such application, is to consider whether the amendment was beyond the jurisdiction of the Judge. Where there is a discretion, the Court would at any rate be slow to interfere with it. The Judge at Nisi prius has circumstances before him which cannot be before the Court in banc. What is in the plea, and what is offered in support of

(a) It was stated that this was the fact.

it, are circumstances forming part only of the materials upon which the Judge may act: the variance, with the knowledge which the parties have of the facts, may come to nothing. Even if we could see that the question on the face of the original plea was different from that on the amended plea, the two questions, at the trial, might well turn out to be the same so far as the merits are concerned. And in this particular case I should not doubt that this was so. The only question was as to the single transaction: the plaintiff must have known that, and probably came down to trial relying on the variance in the description. The Judge had clearly power to amend: and he has exercised his discretion rightly.

WIGHTMAN, J.—I am clearly of the same opinion. The statute enables the Judge to amend where the variance is not material to the merits, and where the opposite party is not prejudiced, subject to a new trial if the Court think the amendment improper. Is this amendment so clearly improper as to induce us to correct the exercise of the discretion of the Judge, a discretion exercised at the time of the trial? *196] The felony was alleged to have been committed by a person *unknown: the evidence offered was of a felony committed by a man named Press. That, in my opinion, was a variance which the Judge might set right by amendment.

ERLE, J., concurred.

Rule refused.

ROLFE v. LEARMONTH. Nov. 3.

The Deputy Sealer in the Court of Chancery performed his duty, of affixing the Great Seal to certain instruments, in a room called the Sealer's room, adjoining the Court at Westminster or Lincoln's Inn where the Lord Chancellor sat for the time being; or in a room called the Sealer's room at the House of Lords when the Lord Chancellor attended the House judicially; and at other times in the Great Seal Patent Office, Quality Court, Chancery Lane.

Held, that the Sealer's room or office, not being a fixed place, but shifting with the avocations of the Lord Chancellor, could not be deemed a place of business for the purpose of giving jurisdiction to a County Court within sect. 128 of stat. 9 & 10 Vict. c. 95.

And *quære* whether the duty performed by the Deputy Sealer was a business at all, within that section.

THE plaintiff in this cause having obtained a verdict against the defendant for less than 20*l.*,

Keane now moved for a rule to show cause why the defendant should not be at liberty to enter a suggestion (*a*) on the roll to deprive the plaintiff of costs, on the ground that the plaintiff did not, at the time of commencing this action, dwell more than twenty miles from the defendant, and that the cause of action arose within the jurisdiction of the Westminster County Court of Middlesex, holden under stat. 9 & 10 Vict. c. 95, within which the defendant carried on his business at the time when the action was brought; the case being also in the other

(*a*) See now stat. 13 & 14 Vict. c. 61, sect. 11.

material respects within the enactments giving the County Court jurisdiction.

It appeared, on affidavits sworn by the defendant, *who described himself as "Deputy Sealer in the Court of Chancery," [*197 that the action, commenced by writ of summons, was for goods sold and delivered and on an account stated; plea, Never indebted: and that the issues were tried before the sheriff of Middlesex by writ of trial. When the action was commenced, and ever since, the plaintiff was dwelling in Great Marlborough Street, in the parish of St. James, Westminster, and the defendant in Blenheim Place, St. John's Wood, Middlesex. The goods were ordered and delivered at the plaintiff's house in Great Marlborough Street, within the jurisdiction of the Westminster County Court. With respect to the defendant's place of business, his statement was as follows.

"That this deponent is, and for the last thirty years has been, an officer of the Court of Chancery, his business and duties being to affix the Great Seal to instruments to which it is appropriate. That this deponent, at the time of the commencement of this action, and at the time when the writ of summons in this action was served on him, carried on his business and performed his duties as such Deputy Sealer between the hours of ten in the morning and three in the afternoon of each day, Sundays excepted, in a room called the Sealer's room, adjoining the Lord Chancellor's Court in Westminster Hall in the county of Middlesex, in which the said Lord Chancellor then held his court. That this deponent, at all times when the said Lord Chancellor holds his court in Westminster Hall, carries on his business and performs his duties as such Deputy Sealer in the said Sealer's room. That, when the said Lord Chancellor performs judicial duties in the House of Lords, this deponent carries on his business and *performs his duties as such Deputy Sealer as aforesaid, during the hours aforesaid, in a [*198 room in the House of Lords aforesaid, called the Sealer's room. That, when the said Lord Chancellor holds his court in the Old Hall in Lincoln's Inn in the county of Middlesex, this deponent carries on his business and performs his duties as such Deputy Sealer as aforesaid, during the hours aforesaid, in a room adjoining the Old Hall aforesaid, called the Sealer's room. That, when the said Lord Chancellors does not sit judicially in the House of Lords or in Westminster Hall, or in the said old Hall, Lincoln's Inn, this deponent attends daily at the Great Seal Patent Office in Quality Court, Chancery Lane, in the county of Middlesex, for the purpose of his business and duties aforesaid. That the said house in which the plaintiff dwelt at the time of the commencement of this action, and the said room adjoining the Lord Chancellor's Court in Westminster Hall aforesaid, called the Sealer's room, and also the said rooms in the House of Lords, and adjoining the old Hall in Lincoln's Inn aforesaid, and the said Great Seal Patent Office, were,

and each of them was at the time this action was brought and still is, within the jurisdiction of the Westminster County Court of Middlesex." The affidavit also stated that the plaintiff was not, as deponent believed, nor was deponent, an officer of the said Westminster Court, or of any other County Court.

Keane grounded his motion on sects. 128, 129 of stat. 9 & Vict. c. 95, contending that the defendant had a place where he carried on business within the jurisdiction of the Westminster County Court, within which the cause of action arose, and that the action ought to *199] have been brought there, though the defendant *had a residence apart from his place of business, and not within the same jurisdiction; *Croft v. Pitman*, 5 Taunt. 648 (E. C. L. R. vol. 1), *Bushnell v. Levi*, 5 Bing. 315 (E. C. L. R. vol. 15); and although the fact of the defendant's carrying on business within the Westminster jurisdiction was unknown to the plaintiff when he brought the action; *Spencer v. Holloway*, 15 East, 647, *Crowder v. Bell*, 2 Dowl. P. C. 508, *Oakes v. Albin*, 13 Price, 793. [ERLE, J.—Is the function of Deputy Sealer an office?] The affidavit states the defendant to have been an officer of the Court of Chancery in that capacity for thirty years.

COLERIDGE, J.—This case is not within sect. 128 of the statute. The words of that clause ("within which the defendant dwells or carries on his business") evidently contemplate some fixed place at which the party's business is carried on, at least for a certain time. Assuming that the office of the Deputy Sealer is a business, he carries it on in no place whatever. He attends the Lord Chancellor wherever he may be. He is not at any specific time carrying on a business in any fixed place. The rule cannot be granted.

WIGHTMAN, J.—I am of the same opinion. The Deputy Sealer cannot be said to carry on his business in any place. In truth the duty he performs can hardly in any view be considered "his" business. He merely follows the Lord Chancellor.

ERLE, J.—If this be a business at all, which I doubt, it has no locality. The officer follows the Lord Chancellor wherever he happens to be.

Rule refused.

*200]

*CHARD v. FOX. Nov. 5.

It is sufficient notice of dishonour to the endorser of a note if a person acting for the holder informs him that the note has been presented and dishonoured, though he does not add that the endorser will be looked to for payment, and though, at the time of such notice, he inquires of the endorser where the maker resides.

ASSUMPSIT by endorsee against endorser of a promissory note.

Plea, among others, that defendant had not due notice of the non-

payment of the said promissory note as in the declaration alleged: conclusion to the country. Issue thereon.

On the trial, before Lord DENMAN, C. J., at the sittings in Middlesex after last Trinity term, it appeared that an alleged presentment to the maker had been made by leaving a memorandum at a house where the maker, who was the defendant's son, had resided, but which was no longer occupied; and, the note not being paid, notice was given to the defendant by a person named Barber, an agent of the holder. Barber, who was a witness for the plaintiff, stated that, on the day after the note became due, he called on the defendant and "gave him notice of dishonour." On cross-examination, Barber admitted that he had not asked for payment, but had said only "that the note had been presented and dishonoured." It appeared also that he had at the same time made inquiry as to the residence of the maker. The defendant's counsel objected that the notice of dishonour was not properly proved; but the case was allowed to proceed; and the Lord Chief Justice left it to the jury on a question as to a supposed alteration in the note. Verdict for plaintiff.

**Gurney* now moved for a new trial.—The notice was insufficient. A notice of dishonour "should at least inform the party [201 to whom it is addressed, either in express terms or by necessary implication, that the bill has been dishonoured, and that the holder looks to him for payment;" *Solarte v. Palmer*, 7 Bing. 530 (E. C. L. R. vol. 20), S. C. 1 Cro. & J. 417,† 1 Tyr. 371.(a) Here the defendant was not told that the holder looked to him for payment, but was rather led to suppose the contrary, by the inquiry after the maker. [ERLE, J.—The word "dishonoured" has been considered as nomen artis, and embracing all the requisites. COLERIDGE, J.—In Mr. Serjt. Byles's Treatise,(b) it is stated that "an announcement of the dishonour will (at least, if it come from the holder), amount to a sufficient intimation to the endorser, that he is held liable."] In *East v. Smith*, 4 Dowl. & L. 744, COLERIDGE, J., held it essential, in a notice of dishonour, to inform the party served that the party giving it looks to him for payment. (*Gurney* also referred to *Armstrong v. Christiani*, 5 Com. B. 687 (E. C. L. R. vol. 57). WIGHTMAN, J., mentioned *Phillips v. Gould*, 8 Car. & P. 355 (E. C. L. R. vol. 34).

COLERIDGE, J.—There will be no rule on this point. The disposition of the Courts has not been to extend the doctrine acted upon in *Solarte v. Palmer*. And I think that the notice here was sufficient. An authorized agent of the holder goes to the defendant, the *endorser of [202 the note, and inquires after the maker. If the holder had not meant to claim against the defendant, the communication would have

(a) Judgment (of Exch. Ch.) affirmed in Dom. Proc., *Solarte v. Palmer*, 8 Bligh. N. S. 874; S. C. 1 New Ca. 194.

As to the latter part of the above dictum, see *King v. Bickley*, 2 Q. B. 419 (E. C. L. R. vol. 42).

(b) Byles on Bills of Exchange, 213, 6th edition.

ended there: but the party goes on to state that the note has been presented and dishonoured. The effect of such a notice is not varied, because the person who gives it inquires also after the residence of the maker.

WIGHTMAN and ERLE, Js., concurred.

Rule, on this point, refused.(a)

(a) A rule nisi was granted on a question as to the sufficiency of the presentment.

Notice of the dishonour of a bill need not state that the holder looks to the party notified for payment—this is implied by the act of giving notice: *Cowles v. Hart*, 3 Connecticut, 517; *Shrieve v. Duckham*, 1 Litt. 194; *Bank v. Norwood*, 1 Har. & Johns. 423; *Clark v. Elbridge*, 13 Metcalf, 96.

FREEMAN v. STEGGALL. Nov. 5.

A party who has been called upon in the ordinary form (Reg. Gen. Hil. 4 W. 4, § 20, and Form A.) to admit a document before trial, and has done so, cannot, at the trial, object to such document on the ground that it has an interlineation not accounted for by evidence, unless it appear that the interlineation was made after the admission.

COVENANT on a deed of transfer of a mortgage. Plea: Non est factum.

On the trial, before WILDE, C. J., at the last summer assizes for Suffolk, the deed, when produced, was found to have a material interlineation. It was in a different handwriting from the deed; and the plaintiff could produce no evidence to account for the alteration. Notice to admit the deed had been given under Reg. Gen. Hil. 4 W. 4,(a) and admission made accordingly; and it did not appear on the trial, or on the after-mentioned motion, that the notice, or admission, was in any but the usual form.(a) A verdict was found for the plaintiff, leave being reserved to move to enter a nonsuit.

*203] *Palmer* now moved accordingly.—[WIGHTMAN, J.—The common form requires an admission, which must be supposed to have been made in this case, that any original documents admitted “were respectively written, signed, or executed as they purport respectively to have been,” “saving all just exceptions to the admissibility of all such documents as evidence in this cause.” These “exceptions” cannot include the objection that a document was not “written” as it purports to be when produced.] The alteration may have been made since the admission. [ERLE, J.—The party called upon to make the admission is entitled to have the document produced at that time. Unless proof be given that when put in at the trial it is not the same as it was when so produced, it must be taken to be the same. WIGHTMAN, J.—The party called upon to admit need not do so if anything questionable appears on the document at that time. COLERIDGE, J.—If there is an interlineation, the person to explain it is the attesting witness. It

(a) Reg. Gen. Hil. 4 W. 4, 20, and Form A. 5 B. & Ad. xvii.—xix. (E. C. L. R. vol. 27). 144

would be a trap for the party producing, if the attesting witness could be got rid of by an admission, and the objection taken afterwards.] If there is an interlineation when the document is executed, the attestation takes notice of it. [WIGHTMAN, J.—That is not always done.] In this case the attesting witness was in Court at the trial.(a)

COLERIDGE, J.—We must take it, here, that the admission was in the common form. If it had been specially framed, we must suppose that attention *would have been called to it at the trial. And, sup- [*204
posing the admission to have been in the common form, I think
the present objection was waived. The object of an admission under the rule of Court is to dispense with the attesting witness. The party called upon to admit sees the document, and does so for the purpose of ascertaining whether there is any ground of objection to it. If he perceives an interlineation, either he objects then, or it must be taken that he dishonestly declines to do so: for, in the absence of objection, his opponent will not bring the attesting witness. Therefore, if the objection be not made, it must be taken as waived.

WIGHTMAN, J.—I am of the same opinion. A party making an admission under the Rule of Court must be taken to admit that the document which he sees was “written, signed,” and “executed” as it purports to be. If this were not so, the inconvenience would arise which has been pointed out by my brother COLERIDGE.

ERLE, J., concurred.

Rule refused.

(a) *Palmer* also objected that the instrument, as it appeared in evidence, varied from the deed as declared upon: but this objection was overruled, on the ground that the legal effect was not altered.

*SAYLES v. BLANE. Nov. 6.

[*205

S. sold railway shares, of which B., after intermediate sales and without any privity with S., became purchaser; and S. transferred them to B. by deed. S., at the time of the sale by him, was registered owner, and so remained, B. not having registered. After the purchase by B., a call was made upon S., which S. was obliged to pay, under stat. 8 & 9 Vict. c. 16, s. 15. Held, that for such payment S. could not maintain an action against B. as for money paid to his use.

ASSUMPSIT. The only count material to the point decided was for Money paid. Plea: Non assumpsit. Issue thereon.

On the trial, before PATTESON, J., at the last York Assizes, the plaintiff was nonsuited, leave being reserved to move to enter a verdict for the plaintiff.

Martin now moved accordingly.(a)

(a) Before PATTESON, COLERIDGE, and WIGHTMAN, Js.

Besides the authorities mentioned in the judgment, the following were referred to on the motion: *Spencer v. Parry*, 3 A. & E. 331 (E. C. L. R. vol. 30); *Brittain v. Lloyd*, 14 M. & W. 762;† *Bailey v. Macaulay*, 13 Q. B. 815 (E. C. L. R. vol. 66); *Burnett v. Lynch*, 5 B. & C. 589, 603 (E. C. L. R. vol. 11); *Bayley v. Wilkins*, 7 Com. B. 886 (E. C. L. R. vol. 62).

The facts of the case, and the nature and grounds of the application, appear fully from the judgment. *Cur. adv. vult.*

COLERIDGE, J., in the same term (November 21st), delivered the judgment of the Court.

The special count in this case not having been proved, the question is, whether the plaintiff was entitled to recover upon the count for money paid.

The plaintiff was registered owner of certain railway shares. The defendant, through his broker, purchased a number of shares in the same Company on the 5th of January. The plaintiff, the day after, viz. on the 6th, through his broker, sold his shares; but the respective brokers were not brought together by the evidence; and indeed it is *206] apparent by the dates that the *defendant did not purchase of the plaintiff, and that third persons intervened between them. The plaintiff, however, being the registered owner, was called upon to transfer to the defendant, and did so, by a deed regularly executed.

It was then the duty of the defendant to have procured that deed to be registered, which appears, as well by the custom and usual course of dealing, as by the decision of Vice-Chancellor KNIGHT BRUCE in *Smith v. Price*, (a) cited by Mr. *Martin*. The defendant did not procure the transfer to be registered, and sold the shares to some other party; and the plaintiff still remained the registered owner. Afterwards calls were made; and the plaintiff was called upon to pay, and did pay them, after giving notice to the defendant and requiring him to pay.

The statute 8 & 9 Vict. c. 16, s. 15, provides that, until the transfer deed is registered, the transferor shall be liable for calls, and shall receive all profits, and that the transferee shall not be entitled to any profits, or to vote in the affairs of the company.

Now the count for money paid proceeds on one of two suppositions: either that the plaintiff has paid the money for the defendant at his request; or that he has been compelled to pay money for which the defendant was liable to the person receiving it, as in the case of a surety paying the debt of his principal, and similar cases. Here there is no ground for saying that the defendant directly or indirectly requested the plaintiff to pay the money. Neither is there any ground *207] for saying that the defendant was liable to any one for the *money paid by the plaintiff, so as to create the relation of principal and surety, or any other relation of a like kind. The statute plainly continues the liability of the plaintiff, and gives him the interest in and profits of the concern, until the transfer is registered, treating the defendant as an entire stranger to the company; and the payment of the calls by the plaintiff did not in any way alter his, the defendant's, position. At most, there was a failure in the performance of a

(a) The case referred to appears to be *Wynne v. Price*, 3 De G. & Sm. 310.

duty on the part of the defendant, in not getting the transfer deed registered, which the plaintiff might have called upon him to perform, although he does not appear to have done so.

We think, therefore, that the principle on which the case of *Humble v. Langstan*, 7 M. & W. 517,[†] was decided, applies to this case; and that it is impossible to treat this as a case of money paid to the use of the defendant.

Rule refused.

The QUEEN v. The INHABITANTS of ALL SAINTS, DERBY.

Nov. 14.

The children, born in England, of an Irish father and an Irish mother became chargeable, while under the age of sixteen, after the father had deserted them and the mother had died.

Held, that they were removable to the parish of their birth, notwithstanding stat. 8 & 9 Vict. c. 117, s. 2; that enactment not making English born children removable directly, but only as part of the family of a parent who is removed.

ON appeal against an order of justices for removing Joseph Doland and Sarah Doland from the parish of All Saints in the borough of Derby to the township of Sheffield in the county of York, the sessions quashed the order, subject to the opinion of this Court on a case, the material parts of which are as follows.

*Margaret Doland, in her examination before the removing justices, which the case set forth, deposed: "I am about sixteen [*208 and a half years of age, and am the daughter of Dennis and Sarah Doland, both Irish people. About five months ago my said father went away from Derby, leaving myself and my brother Joseph Doland, aged eight years, and my sister, Sarah Doland, aged six years, in a house which my father had then for some time past been occupying in the Shakspeare Yard, Bold Lane, Derby. In consequence of our father having thus deserted us, I and my said brother and sister were taken into the Derby Union workhouse, where we have been maintained from that time until the present. I remember the respective births of my said brother and sister: they were both born in a house in Shammell's Croft in the town of Sheffield, where our parents lived for about five years, namely about three years before and two years after my said sister's birth. It is about four years since my parents came to Derby. For the first two months we resided in Walker Lane, and then about a year and a half in St. Helen's Walk, when my father removed to the house mentioned, in the Shakspeare Yard, my mother having died whilst we resided in St. Helen's Walk. I lived with my parents until my mother's death, from the time of my earliest recollection, and with my father until he deserted us." By another deposition it appeared that the house in Shakspeare Yard was in the parish of All Saints, and within the Derby Union.

The first ground of appeal related to supposed defects in the heading and jurat of the examinations, and is not material.

*209] *The second ground was: That the examinations show, and the fact was and is, that the parents of the said paupers were Irish people, and that neither of the said parents ever had any settlement in England; and that their father, Dennis Doland, was still living when the said order of removal was made; and that the said paupers, being at the ages respectively stated in the said examinations, were not nor was either of them then liable to be removed to the place of their said birth in England.

The third ground was: That the paupers, being the unemancipated and infant children, of the ages of eight years and six years respectively, of Irish parents, and neither of their said parents having ever acquired a settlement in England, and the paupers having become chargeable to All Saints, Derby, "by reason of relief given to them," the father, Dennis Doland, did then, by reason of such relief so given to his said children, become chargeable to the said parish of All Saints: whereby and by reason whereof the said paupers, neither of them having done any act to acquire a settlement in England in their own right, were respectively liable to be removed to Ireland; and the order for their removal to Sheffield ought not to have been granted.

On the trial of the appeal, it was admitted, on both sides, that the facts were as stated in the above examination and grounds: viz. "That the paupers were born in the appellant township, of Irish parents, neither of whom had gained any settlement in England: that their mother was dead, and their father had deserted them about five months *210] before the making of the said *order, leaving them chargeable to the respondent parish: and that he had not since been heard of at Derby."

The Sessions quashed the order on the first ground of appeal, subject to the opinion of this Court.

The appellants insisted, under the second and third grounds of appeal, that the paupers ought to have been removed to Ireland under the provisions of stat. 8 & 9 Vict. c. 117, s. 2: or, if not so removable, that they were not removable under the circumstances above mentioned to the place of their birth at Sheffield. The Sessions gave leave to the appellants to include these grounds of objection in the case.

If the Court of Queen's Bench should be of opinion that all the objections so taken by the appellants ought to have been overruled, the order of sessions was to be quashed, and the order of removal confirmed. If the Court should think the objections or any of them fatal, the order of removal was to stand quashed, and the order of sessions to be confirmed.

Pashley, (a) in support of the order of Sessions.—When the children

(a) The argument was begun on November 10th, and continued, and judgment given, on November 14th.

under the age of sixteen became chargeable to All Saints by the relief given, the father also was chargeable, according to stat. 4 & 5 W. 4, c. 76, s. 56; and he was removable to Ireland under stat. 8 & 9 Vict. c. 117, s. 2, which supplies defects that had existed in the former law,^(a) and enacts that, if a person "born in Scotland or Ireland," &c., and "not settled in England, become chargeable to any parish in England by *reason of relief given to himself or herself, or to his wife," [*211 or to any legitimate or bastard child, such person, his wife, and any child so chargeable, shall be liable to be removed respectively to Scotland, Ireland," &c.; and if the guardians or overseers "complain thereof to any one justice of the peace, such justice may, if such person do not attend voluntarily, summon him to come before any two justices of the peace, at any time and place to be named in the summons; and at such time and place, or on the attendance of such person, any two justices may hear and examine into the matter of such complaint, and if it be made to appear to their satisfaction that such person is liable to be so removed as aforesaid, and if they see fit, they may make and issue a warrant under their hands and seals to remove such person forthwith at the expense of such union or parish." The family, in such a case, are removable as the father is. It will be argued on the other side that the power of removing the family exists only when the father can be summoned. In such a case there could be no doubt: but it is not a necessary condition that the father should be amenable to a summons: and it may be asked, on the other hand, what will be the consequence if the children are removable to their birth settlement. The order being conclusive of the settlement in that parish, are the children from thenceforth irremovable to Ireland, though the father should return and they become once more resident with him as part of his family? The objections formerly derived (as in *Rex v. Benett*, 2 B. & Ad. 712 (E. C. L. R. vol. 22) from the want of a poor-law in Ireland, exist no longer; and now, by sect. 6 of stat. 8 & 9 Vict. c. 117, guardians of the poor in *Ireland are enabled to appeal against a removal from this country. The words of stat. 10 & 11 Vict. [*212 c. 33, s. 1, go farther than those of the prior statute; for it is enacted there that the parish officer may carry before a justice, with a view to removal, "every poor person who shall become chargeable to any parish in England, and who he may have reason to believe is liable to be removed from England under" the recited act, 8 & 9 Vict. c. 117. Under the former law, if the head of the family was Irish or Scotch, it was considered improper to remove the family to a place in England. HOLROYD, J., said, in *Rex v. Leeds*, 4 B. & Ald. 498, 502 (E. C. L. R. vol. 6): "By the act" (59 G. 3, c. 12, s. 33), "if the husband becomes chargeable by himself, or his family, he may be removed; and it seems

(a) *Pashley* referred to stat. 17 G. 2, c. 5, ss. 7-14, stat. 59 G. 3, c. 12, s. 33, and stat. 3 & 4 W. 4, c. 40.

to me that it is altogether immaterial, provided the head of the family be born in Scotland, whether the children be born in England or not." The judgment of the Court in *Rex v. Mile End, Old Town*, 4 A. & E. 196 (E. C. L. R. vol. 31), supports that doctrine. *Rex v. Great Clacton*, 3 B. & Ald. 410 (E. C. L. R. vol. 5), furnishes no authority for removing to a place in England, unless perhaps where the child, born in England, has no longer a parent living. *Regina v. Preston*, 12 A. & E. 822 (E. C. L. R. vol. 40), where the removal to a birth settlement in England was confirmed, was the case of an emancipated child. It has long been held, that if the husband is absent (unless in such a case as *Regina v. Stogumber*, 9 A. & E. 622 (E. C. L. R. vol. 36)), the wife and children may be removed to his place of settlement. In *Regina v. Pott Shrigley*, 12 Q. B. 143 (E. C. L. R. vol. 64), a married woman who had resided in a parish more than five years, was yet held not to be irre-
 *213] movable by stat. *9 & 10 Vict. c. 66, s. 1, because her husband had not completed the five years. If there were an order to remove the father and children, and he had absconded, clearly the order might be executed as to the children. No statutory enactment confers a derivative settlement on either wife or children: it arises from a sort of common law principle that there shall be no separation of husband and wife or parent and child.

Whitehurst and *Boden*, contrà.—Stat. 10 & 11 Vict. c. 33 adds nothing material to the former law, except the power of taking a chargeable person before a justice without a summons or warrant. The question here turns wholly on stat. 8 & 9 Vict. c. 117; and it is, how far that act has repealed the former law by which, under stat. 13 & 14 Car. 2, c. 12, s. 1, the paupers would be removed to their English place of settlement. Now the person to be affected by stat. 8 & 9 Vict. c. 117, s. 2, must be one who shall "become chargeable to any parish in England," being "born," not of Irish or Scotch parents, but "in Scotland or Ireland," and "not settled in England." In the present case no person has become chargeable who answers these descriptions. The children could not have been summoned according to the direction of sect. 2. [ERLE, J.—If the father had been found, could not the children have been removed with him?] They might, as part of his family, whether settled or not. Stat. 8 & 9 Vict. c. 117, s. 2, can apply to the children only when they actually form a part of the father's family. If he is dead, or not to be found, they cannot be removed. [COLERIDGE, J.—Do you say that, on his absconding, they are no
 *214] longer part of his family? ERLE, J.—Does their *settlement fluctuate as he goes and returns?] They have a birth settlement in England by the former law; and they cannot be removed under the conditions of the late act if the father cannot be found. And, further, supposing that their birth settlement did not avail, the process for removing them cannot be enforced. Before they can be

removed as part of his family, he must be summoned, under stat. 8 & 9 Vict. c. 117, s. 2. That is a condition precedent, and cannot be fulfilled here. It is conceded on the other side that, if the father were dead, the children might be removed to the birth settlement: if so, they may be removed to it in the present case. *Rex v. Great Clacton* decides this point. It is asked, what would be the consequence if the children were removed to Sheffield and the father afterwards returned. But he might then be summoned under the statute, and the whole family removed to Ireland. It does not follow that, in the mean time, the children are not to be maintained by Sheffield. The present order would not operate as an estoppel to an application for removal after summons: for the settlement of the children, however established by the order, could not interfere with the statutory proceeding. *Rex v. Mile End, Old Town*, was decided under stat. 3 & 4 W. 4, c. 40, s. 2: it was held that the chargeability of the pauper, she not having been emancipated (inasmuch as stat. 4 & 5 W. 4, c. 76, s. 56, was inapplicable), made her father chargeable, and that she must be removed with him to Ireland as part of his family, under the statute. But suppose, after she had been removed to Ireland *with her father, she had [*215 come back alone; she could not then have been removed, because the power to remove reached her only through the chargeability of her father, who in that case would not have been accessible to the proceeding. She must therefore have gone to her birth settlement. A woman who, having a settlement, marries an Irishman, cannot be removed to Ireland after his death. If he has deserted her, she is to be removed to her maiden settlement; *Rex v. Cottingham*, 7 B. & C. 615 (E. C. L. R. vol. 14); a case decided while stat. 59 G. 3, c. 12, s. 33, was in force, which, as to the point now in question, does not differ from stat. 8 & 9 Vict. c. 117, s. 2: and there *Rex v. Leeds* is distinguished, as a case where the wife and children were living with the husband. Stress is laid on sect. 56 of stat. 4 & 5 W. 4, c. 76: but that, and the section following, create only a chargeability in the father, not a settlement of the children; *Rex v. Walthamstow*, 6 A. & E. 301 (E. C. L. R. vol. 33). And, if it is intended to suggest, as an inference from this enactment, that the children are not chargeable to the removing parish because the father is chargeable, the answer is that, if that were so, the children separated from the father could never be removed. Besides, even if this inference were warranted, the enactment could not apply here, as it is not made a ground of appeal that the children are not chargeable. In *Regina v. Wendron*, 7 A. & E. 819 (E. C. L. R. vol. 34), it was held that, where the mother of a bastard child married and left the child, and the child became chargeable, it was removable to the parish of its birth. The judgment of COLERIDGE, J., in that case shows that the child was neither irremovable nor removable to *the [*216 parish of the husband: and this argument is applicable to the

present case. That the retaining of a settlement by the children is not affected by the statutes authorizing the removal of the father to Ireland, appears from *Rex v. Benett*, 2 B. & Ad. 712 (E. C. L. R. vol. 22), and *Regina v. Preston*, 12 A. & E. 822 (E. C. L. R. vol. 40).

COLERIDGE, J.—This case has been very fully argued, and rightly so; for it is one of much importance. We are to determine the proper interpretation to be put upon the provisions of stat. 8 & 9 Vict. c. 117, s. 2. It seems to me that the rule for quashing the order of sessions must be made absolute. The two paupers are legitimate children born in a known parish in England. The father and mother are both Irish; and neither has any settlement in England: the mother is dead: the father has deserted the children. The last circumstance must be considered as working, by the wrongful act of the father, an entire separation for the time being: it is not as if he had merely gone to another parish which was known or might be ascertained; for that would not justify calling the case one of absolute desertion, which is what the sessions have found. Now *Rex v. Cottingham*, decided while the law was regulated by stat. 59 G. 3, c. 12, s. 33, had established that, in the case of desertion of his family by an Irishman, the English settlement of the members of his family must be inquired into. The mother here is dead: were that not so, her maiden settlement must have been inquired into, according to *Rex v. Cottingham*. Then comes the question, had these children any settlement at all? It is an established *217] principle that every *English subject has a settlement by birth *primâ facie*; that is, till an acquired settlement is shown; until then it is no more than *primâ facie*; and, when it is ascertained that the father or mother has an English settlement, that is the settlement of the child. But, if neither has one, or (which comes to the same thing) if neither has one which can be ascertained after search made, the *primâ facie* settlement, which always potentially exists, takes effect; I will not say, revives. The presumption of law is not negatived; and the child is removable to its birth settlement. That is the state of law, independently of the statute. Then the only question is, whether the present statute gives the justices any power inconsistent with this. We must look at the words; for, if they are plain, it is of no use to say that the remedy given is incomplete, or that the statute has been framed without due observation of existing circumstances. (His Lordship then read the words of stat. 8 & 9 Vict. c. 117, s. 2.) Here, the person to be removed must be “born in Scotland or Ireland,” &c., and must be chargeable “by reason of relief given to himself or herself, or to his wife, or to any legitimate or bastard child:” if these conditions are satisfied, then only are “such person, his wife, and any child so chargeable,” declared “liable to be removed respectively to Scotland, Ireland,” &c. In this case you do find that the father is born in Ireland and has become chargeable. But, when you go on to inquire

how the legal functionaries are to carry the law into effect, you find that the person himself must be dealt with as the subject of removal: "if such person do not attend voluntarily" he is to be summoned; and, at the time and place named in the summons, "or on the attendance of such person," *the warrant issues "to remove such person." [*218 Now those provisions, if the person do not appear, cannot be complied with: and that seems to dispose of the case at once. Many suggestions have been made as to the difficulty of dealing with the case supposing the parent to be found: after what I have said, I need not answer these. But, as at present advised, I see no difficulty. It is suggested that, after the children have been removed to their birth settlement, and the father has become chargeable in respect of relief given to them, they must, if the father be found while they are unemancipated, still be removed with him. As at present advised, I do not see why that should not be. We decide now only on the removal to the birth settlement under the present circumstances: but, subject to discussion, I think the consequence suggested would amount only to this: that it would become necessary to remove the children from their place of settlement to a place where they were not settled: and this, I think, does not destroy the liability to removal now. However, all that we have now to determine is, whether the magistrates were justified in quashing this order of removal: and I think they were not; and that their order must be quashed.

WIGHTMAN, J.—I am entirely of the same opinion. Mr. *Pashley* appears to contend that, unless the children can be removed under stat. 8 & 9 Vict. c. 117, s. 2, they cannot be removed at all. As the case is stated, we must take it that the father is Irish, and has no settlement in England, and has deserted his children; and that neither they nor the mother had any acquired settlement; that the children have only their *primâ facie* birth settlement. It is said that the [*219 statute supersedes the state of things which would otherwise result from those facts, and destroys the operation of the present law of settlement respecting paupers having only birth settlements. Is that so by the terms of sect. 2? If not, then the removal must be to the birth settlement, according to many authorities; *Regina v. Preston*, *Regina v. Wendron*, 7 A. & E. 819 (E. C. L. R. vol. 34), *Rex v. Cottingham*, 7 B. & C. 615 (E. C. L. R. vol. 14). So that it comes, as has been properly argued, to the question whether stat. 8 & 9 Vict. c. 117, s. 2, has entirely superseded the ordinary rule. It seems to me that the statute applies directly to the father only, and to the children not otherwise than incidentally, as part of his family; and that, if the father cannot be removed, there is no power over the child. But then it is suggested, as a difficulty attaching to this view, that the father may come back; that he will then be removable under the statute; and that then the children will be removable with him. This point has been

already noticed in *Rex v. Cottingham*; and it was there considered that there was no inconsistency in such a result. The removal to the birth settlement takes effect till the statute comes into operation by the father being brought within reach of the summons: and then he may be removed, and his children with him, notwithstanding their settlement.

COLERIDGE, J., added: I perhaps expressed myself too strongly when I said that, under sect. 2, the removal could not be ordered unless the person born in Ireland appeared under the summons. The *220] section perhaps *means that the order may be made at the time and place named, whether he appears or not, or at any time when he does come. That, however, makes no difference in my opinion on the case; because, if he is absent, service of the summons upon him must be shown, so that, at all events, the proceeding relates to him.

ERLE, J.—I think the children are not removable to their birth settlement as long as they are removable with their father: but, when the personal removability of the father is destroyed, as by his death, the birth settlement takes effect as to the children. There is then a contingent settlement, when children of an Irish father are born in England. Then the question is, whether a desertion by the father is a case in which a settlement of that kind attaches. I agree that desertion, which is a term well known in cases on the poor law, must be taken to be an absenting without reasonable prospect of return. The difficulty pressed upon my mind, how the case would stand if he were absent only, for instance, four months, and in the mean while the birth parish were fixed with the settlement. There might be considerable inconvenience. But I should adopt the answer which has been given. There could be no objection, in that case, to showing by evidence that the only settlement which the birth parish had admitted was the contingent settlement.

Order of Sessions quashed.

*221] *The QUEEN v. The Inhabitants of CROWAN. Nov. 14.

Justices, by a regular order, having the county as venue, removed a pauper to his settlement; and they, at the same time, by endorsement on the order of removal, suspended the execution on account of his illness. Afterwards one of the same justices and another justice, by order endorsed on the first order, directed a removal; and, by a contemporaneous order, similarly endorsed, they directed payment of expenses. The last two orders did not, either by venue in the margin or statement in the body, show that they were made in the county.

Held, that they were bad for this fault; and they were quashed on certiorari.

Stat. 12 & 13 Vict. c. 45, s. 7, which enacts that no objection on account of any omission or mistake in an order shall be allowed on return to a certiorari, unless specified in the rule for issuing the certiorari, does not apply where the rule for a certiorari has been made before the time fixed for the statute coming into operation.

MONTAGUE SMITH, in Hilary term, 1848, obtained a rule calling on

John Hearle Tremayne and Charles Brune Graves Sawle, Esquires, justices of Cornwall, to show cause why a certiorari should not issue to remove into this Court two orders made by them, dated respectively the 5th October, 1847, and endorsed on a certain order of the said C. B. G. Sawle and of Charles Lynes, clerk, one other justice of Cornwall, dated 8th July, 1845, for the removal of John Symonds, Sarah his wife, and Ann their daughter, from the parish of Tywardreath to the parish of Crowan, both in the said county (the rule then described the contents of the endorsed orders): at the instance of the inhabitants of the said parish of Crowan; upon notice of the rule to be given to the justices, and the churchwardens and overseers of Tywardreath.

This rule was made absolute in Easter term, 1848 (11th May). In Michaelmas term 1848 (4th November), *Montague Smith* obtained a rule to show cause why the orders should not be quashed for insufficiency. No objection was specified in any of the rules. The first order of removal was as follows.

"County of Cornwall. To the churchwardens and overseers," &c. (of Tywardreath, and of Crowan), "and to each and every of them. Upon the complaint of *the churchwardens and overseers of the poor of the parish of Tywardreath aforesaid, in the said county [*222 of Cornwall, unto us, whose names are hereunto set and seals affixed, being two of Her Majesty's justices of the peace in and for the said county of Cornwall, and one of us of the quorum," &c. The order then directed the removal of the three paupers, being actually chargeable, &c., to Crowan, adjudging their lawful settlement to be there. "Given under our hands and seals the 8th day of July, A. D. 1845.

"C. B. GRAVES SAWLE. (L. S.)

"CHARLES LYNES. (L. S.)"

On this was endorsed the following order.

"County of Cornwall. Whereas it appears unto us, Charles Brune Graves Sawle, Esquire, and Charles Lynes, clerk, the justices within mentioned, that the within named John Symonds and Ann his daughter are at present unable to travel," &c.; suspending the execution of the order. "Given under our hands and seals this 8th day of July, 1845.

"C. B. GRAVES SAWLE. (L. S.)

"CHARLES LYNES. (L. S.)"

The two orders which were brought up by certiorari were also endorsed, and were as follows.

"Whereas it duly appears unto us, John Hearle Tremayne and Charles Brune Graves Sawle, Esquires, two of Her Majesty's justices of the peace for the said county of Cornwall, that the above named Ann, the daughter of the said John Symonds, is dead, and that the said John Symonds is wholly recovered from the sickness," &c., "and that he may therefore now be conveyed from the within mentioned

*223] parish of *Tywardreath to the within mentioned parish of Crowan without danger; These are therefore to authorize," &c. (directing the removal.) "Given under our hands and seals, this 5th day of October, 1847.

"J. HEARLE TREMAYNE. (L. S.)

"C. B. GRAVES SAWLE. (L. S.)"

"Whereas it has been proved on oath before us, John Hearle Tremayne and Charles Brune Graves Sawle, Esquires, the justices whose names are hereunto subscribed and seals set, that the charges incurred by the suspension of the said order of removal amount to the sum of 21l. 13s. 6d., and which charges appear to us to be fair and reasonable;" finding, as above, as to Ann Symonds being dead, and that the expense of 21l. 13s. 6d. had been incurred by the suspension: "Now we, the said justices, do, in pursuance of the statute in that case made, hereby order and direct the churchwardens," &c., "of Crowan, in the county of Cornwall, to which the within named pauper was to be removed, to pay the said charges to the churchwardens," &c., "of Tywardreath, or to such of them as shall demand the same.

"Witness our hands and seals this 5th day of October, 1847.

"J. HEARLE TREMAYNE. (L. S.)

"C. B. GRAVES SAWLE. (L. S.)"

Pashley now showed cause.—It is objected that the endorsed orders do not appear to have been made in the county of Cornwall, and that the order for the payment of the expenses does not appear to be made by justices of that county.

*224] First: this is a mere "omission or mistake in the *drawing up" of the orders, such as is pointed out in sect. 7 of stat. 12 & 13 Vict. c. 45, which enacts "that no objection on account of any omission or mistake in any such order or judgment brought up upon a return to a writ of certiorari shall be allowed unless such omission or mistake shall have been specified in the rule for issuing such certiorari." The statute, it is true, received the Royal assent only on 28th July, 1849: and the rule nisi to quash the orders on certiorari was obtained in November, 1848; (a) and the rule for issuing the certiorari was of course earlier. But statutes which regulate procedure apply to proceedings pending at the time when the statute passes. [COLERIDGE, J.—The result of your argument would be that every rule, made before the statute came into operation, and pending after, would be quashed.] Mere formal objections would be put an end to. [COLERIDGE, J.—The words are "any omission or mistake."] The recital in sect. 7 shows that the omissions and mistakes pointed at are those which are the subject of "exceptions or objections to the form of the order or judgment, irrespective of the truth and merits of the matters in question." [M. Smith.—By sect. 20 the act is to "come into operation" on 1st

(a) *Pashley* pointed out that a similar provision in stat. 11 & 12 Vict. c. 31, s. 6, applied only to orders of removal.

November, 1849.] The question is, what the "operation" is to be. The legislature merely defines the time at which the Court is to act on the statute, naming the last day of the long vacation. Bills of costs incurred before stat. 6 & 7 Vict. c. 78, s. 37, are taxable under that statute, though not taxable at all before; *In re Eyre*, 2 Phillips's Rep. 367. The exclusion of oral acknowledgments, under sect. 1 of the Limitations *act of 9 G. 4, c. 14, was held applicable to acknowledgments made before the act took effect; *Towler v. Chatterton*, [*225 6 Bing. 258 (E. C. L. R. vol. 19)]; even where the cause was at issue before; *Hilliard v. Lenard*, Moo. & M. 297 (E. C. L. R. vol. 22): that section used the words "shall be deemed," which threw the operation on to the time of trial: so here the words "shall be allowed" refer to the action of the Court. The retrospective effect given to the five years' clause in stat. 9 & 10 Vict. c. 66, s. 1, furnishes an analogy in support of the interpretation now contended for. *Regina v. Christchurch*, 12 Q. B. 149 (E. C. L. R. vol. 64), on the proviso in the same clause, goes farther still. So stat. 3 & 4 W. 4, c. 42, s. 31, subjecting executors to costs, was construed retrospectively: (a) and so was the bankrupt act, 6 G. 4, c. 16, s. 108, respecting judgments by nil dicit; *Cuming v. Welsford*, 6 Bing. 502 (E. C. L. R. vol. 19). [COLERIDGE, J.—It might be that, if all had been done rightly up to the time when the statute came into operation, the statute would have applied to omissions occurring afterwards in the same proceeding: but here all the defect, if it be one, existed before the operation of the statute, and therefore cannot be cured by it.]

Secondly: there is no fatal defect, even supposing the statute inoperative. The certiorari admits that those who made the order are justices: the question therefore is only as to their place of acting. The original order of removal has the venue "County of Cornwall;" that applies to the whole instrument. In *Regina v. Casterton*, 6 Q. B. 507 (E. C. L. R. vol. 51), such a venue was held to explain the words "in and for the said county" in *the body of the instrument; and [*226 there an objection much like the present, in support of which *Baker v. Bacon*, Moore, 754, was cited, must have been overruled, as appears from the note. In *Regina v. Silkstone*, 2 Q. B. 520 (E. C. L. R. vol. 42), this Court, to support an order of removal, construed the words "I" and "me" to refer to each of two justices who signed it. That the endorsed orders may be explained by the original order appears from *Regina v. Ashburton*, 8 Q. B. 871 (E. C. L. R. vol. 55), which is to a certain extent supported by *Regina v. Stainforth*, 11 Q. B. 66 (E. C. L. R. vol. 63). In the last-mentioned case, the doctrine of looking for evidence beyond the instrument itself was upheld: and it will apply very strongly here, where the endorsed orders are mere appendages to

(a) *Freeman v. Moyes*, 1 A. & E. 338 (E. C. L. R. vol. 23).

the original order. [ERLE, J., referred to *Regina v. Totness*, 11 Q. B. 80 (E. C. L. R. vol. 63).] The case ordinarily cited against this mode of interpretation is *Regina v. Shipston upon Stour*, 6 Q. B. 119 (E. C. L. R. vol. 51): but the authority of that case is much impaired by the decision in *Regina v. Ashburton*. "That construction which supports, and not that which destroys the instrument, may fairly be adopted;" per HOLROYD, J., in *Rex v. St. Mary's, Leicester*, 1 B. & Ald. 327, 331, where the words "said county" were interpreted by the margin of the order. That case and dictum were relied upon by TAUNTON, J., in *Rex v. Countesthorpe*, 2 B. & Ad. 487 (E. C. L. R. vol. 22). [COLERIDGE, J.—We have no marginal words in the orders now in dispute: you endeavour to explain them by the venue of an order made, long before, by magistrates of whom one only makes the last two orders.] If these *227] orders are to be construed like original orders of removal, they cannot be supported. But they are no more than continuances of the first proceeding. At any rate the last two, being made simul et semel, will stand or fall together. *Regina v. Stockton*, 7 Q. B. 520 (E. C. L. R. vol. 53), may be cited as an authority against this: but there, as PATTESON, J., explained, no inconsistency would have been incurred by supposing that the complaint was made within the jurisdiction and the order made out of it. And, so far as that case applies here, it is overruled by *Regina v. Goole*, 12 Q. B. 172 (E. C. L. R. vol. 64).

Lastly: the Court will be unwilling to quash these proceedings on certiorari. In *Regina v. Hatfield Peveril*,^(a) they declined to quash a certificate of lunacy on certiorari. [ERLE, J.—There the certificate was not in the character of a proceeding in foro contentioso.]

Montague Smith, contra.—The disposition of the Court, last adverted to, will at any rate prevail only where there is jurisdiction: here none appears; and no presumption that acts have been properly done can be made for the purpose of establishing jurisdiction; per HOLROYD, J., in *Rex v. All Saints, Southampton*, 7 B. & C. 785, 790 (E. C. L. R. vol. 14); because the presumption is raised only by assuming that jurisdiction exists.

As to the suggestion that the venue will aid, the orders before the Court have no venue; and the fact that a previous order was properly made affords no inference that an order made two years later and by *228] different persons was so. Even if the venue could be considered as annexed to these orders, it would not aid. There was a venue in *Regina v. Stockton*, 7 Q. B. 520 (E. C. L. R. vol. 53); but it was held nevertheless that the order did not show all to have been done in the place named. That case is conclusive against the orders here: and *Regina v. Newton Ferrers*, 9 Q. B. 32 (E. C. L. R. vol. 58), also shows

(a) Q. B. Trin. Vae. 1849. Reported with *Regina v. Wolverhampton*, Mich. T. 1849. Post.

that it must strictly appear that the persons who act are acting in the place where they have jurisdiction.

COLERIDGE, J.—The rule must be made absolute on the objection to the orders. We intimated, in the early part of the argument, that we thought stat. 12 & 13 Vict. c. 45, s. 7, could not apply to these proceedings.

WIGHTMAN and ERLE, Js., concurred.

Rule absolute.

The QUEEN v. The Inhabitants of ASTON NIGH BIRMINGHAM.
Nov. 14.

Reported 12 Q. B. p. 26 (E. C. L. R. vol. 64).

*The QUEEN v. PERKINS. Nov. 14.

[*229

The Highway Act, 5 & 6 W. 4, c. 50, s. 58, enacts that, where the boundaries of parishes pass across or through the middle of a common highway, justices in special sessions may, on complaint, summons, and hearing, apportion the future liability to repair between the parishes: Proviso, that, in the case of such highway, the repair of any part of which belongs to any body politic or corporate, or to any person, by the reason of tenure of any lands, or otherwise howsoever, the same proceedings may be adopted.

Two justices made an order of apportionment under sect. 58, in the form given by the schedule, No. 14, to the statute, which form does not contain any express finding as to boundary. On appeal to the sessions against this order, evidence was heard on the question, whether or not the highway was upon a parochial boundary; the appellants denied the jurisdiction of the two justices, because, as they contended, the highway did not appear to be on such boundary: the respondents argued that, even if it were not so, the justices had jurisdiction under the proviso. The Sessions confirmed the order, but stated a case, setting forth the facts in evidence on the question of boundary, and the objection taken to the jurisdiction, and adding that, if the Court of Queen's Bench should be of opinion that, under the circumstances stated, the road could be divided, &c., by the said order of justices under the provisions of the statute, the order of Sessions was to be confirmed; if not, both orders to be quashed.

Held that, upon the case so stated, this Court, though the order of justices was made in the statutory form and confirmed at Sessions, might go into the whole question raised by the case; namely, whether there was evidence of a boundary intersecting the highway, or, if not, whether, upon the evidence, the two justices appeared to have had jurisdiction under the proviso. Held that the case did not come within the enactment of sect. 58, as the evidence did not show a boundary intersecting the highway. And that the proviso did not apply. Orders quashed.

ON appeal by John Perkins, a rated inhabitant within, and surveyor of highways of, the hamlet of Gedney Hill, otherwise Gedney Fen, in the parish of Gedney, Lincolnshire, against an order of two justices, purporting to be made under stat. 5 & 6 W. 4, c. 50, s. 58, (a)

(a) Stat. 5 & 6 W. 4, c. 50, s. 58, is as follows.

"And whereas it frequently happens that the boundaries of parishes pass across or through the middle of a common highway, and one side of such highway is situated in one parish and the other side in another parish, whereby great inconveniences often arise in repairing the same; be it enacted, that the justices at a special sessions for the highways, on complaint of any

*230] *whereby two roads, respectively called The Public Road and The Lutton Road, were ordered to be divided transversely, and the expenses of repairing the divided parts of the same to be defrayed respectively in each case by the parts of the parish of Gedney called Gedney and Gedney Fen, the Sessions confirmed the order, subject to the opinion of this Court upon a case.

*231] It appeared by the case that the parish of Gedney *consists of two parts or hamlets called Gedney, and Gedney Hill or Gedney Fen, each separately rated to the land-tax and poor, and each of which had immemorially repaired, separately from the other, the highways situate within it. By an Enclosure Act, 31 G. 3, c. 49, private, "for dividing and enclosing the common marshes, droves, waste lands, and grounds, in the parish of Gedney, and hamlet thereof, called Gedney Fen, in the county of Lincoln," provision was made for allotting and enclosing lands consisting of droves, some in Gedney Fen, and some in the part of the parish called Gedney, and of a large open common called The Old Common or The Common Marsh, containing 700 acres (over which no roads were maintained before the passing of this act), surrounded on three sides by the part of the parish called Gedney, and on the fourth by a seabank, which divided it from an open salt marsh overflowed by the sea at high water. The said droves and Marsh were subject to rights of common vested in the proprietors of certain messuages, &c., in Gedney and Gedney Fen. The Old Common was at the opposite extremity of the parish to that part called Gedney Fen, and was

surveyor of any parish (stating in writing, and on a plan thereunto annexed, that there is such a highway, one side whereof ought to be repaired by one parish, and the other side by another, and particularly describing the same by metes, bounds, and admeasurements thereof), may issue their summons, with a copy of such writing and plan thereunto annexed, to the surveyor of such other parish, to appear before them on a day mentioned in such summons; and if the parties appear such justices may then proceed finally to decide the matter in manner herein mentioned, in case all the parties shall consent thereto;" power is then given, if the surveyor shall not appear, or, appearing, require further time, to adjourn the case to a future day: "On which day the said justices shall proceed to hear the parties and their witnesses, and, whether the party summoned does or does not appear, shall proceed to examine and finally determine the matter in form following; (that is to say) that it shall and may be lawful for such justices and they are hereby required to divide the whole of such common highway, by a transverse line crossing such highway, into equal parts, or into such unequal parts and proportions as, in consideration" of all the circumstances, they in their discretion shall think right; "and to declare, adjudge, and order that the whole of such highway on both sides thereof, in any of such parts, shall be maintained and repaired by one of such parishes, and that the whole thereof on both sides, in the other of such parts, shall be maintained and repaired by the other of such parishes:" and the justices shall cause their order, and a plan, &c., to be "filed with the clerk of the peace of the county in which such highway shall happen to lie, and shall also cause such posts, stones, or other boundaries to be placed and set up in such highways as in their judgment shall be necessary for ascertaining the division and allotment thereof: Provided nevertheless, that in the case of any such last-mentioned highway, the repair of any part of which belongs to any body politic or corporate, or to any person, by the reason of tenure of any lands, or otherwise howsoever, the same proceedings may be adopted, but the said body politic or corporate, or person, or some one on their behalf, may appear before such justices, and object to such last-mentioned proceedings, in which case the said justices shall, before they divide such highway as aforesaid, hear and consider the objection so made, and determine the same."

nowhere less than nine or ten miles distant from it. The Public Road and The Lutton Road, above mentioned, were in The Old Common, and were set out in 1795, the latter as a private road, by award of Commissioners under the above-mentioned Enclosure Act, who awarded that these and other public and private roads mentioned in the award should for ever thereafter be considered as lying and being in Gedney. They also set out certain allotments on The Old Common, as to which details were given by the *case. For the distance of 600 yards along The Public Road there were allotments on one side in respect of [*232 commonable messuages, &c., in Gedney, and on the other side in respect of such messuages, &c., in Gedney Fen: and for 1198 yards along The Lutton Road there was the like distribution of allotments in right of such messuages, &c., in Gedney and Gedney Fen respectively. By a subsequent part of their award, in 1799 (the said open saltmarsh having then been embanked and allotted), the Commissioners declared and awarded that certain roads should be "deemed and taken to lie within and be part of the said parish of Gedney and hamlet of Gedney Fen in the proportions following, viz.: so much of the said Public Road in the old embanked marsh from the west side," &c., "as far as an allotment," &c. (describing termini), "shall hereafter be kept in repair at the joint expense in equal portions by the said parish and hamlet; and so much of the road called The Lutton Road in the old embanked marsh aforesaid, from the aforesaid allotment," &c., "as far as an allotment," &c., "shall hereafter be kept in repair at the joint expense in equal portions by the said parish and hamlet." The portions of the two roads thus described are the subject of the before-mentioned order of justices.

No repairs were ever done by Gedney or Gedney Fen to The Public Road, nor to the Lutton Road till 1814; but from that year till the making of the agreement after mentioned, they contributed equally to the maintenance of the latter road. On 29th July, 1825, the surveyors of highways of Gedney and Gedney Fen met together, and agreed in writing to divide the roads in question by a transverse line, and that The Lutton *Road for the length of four furlongs and nineteen yards should thereafter be wholly maintained by Gedney Fen, [*233 and the remainder of the said road, and also The Public Road for the length of four furlongs and nineteen yards, should be wholly maintained and repaired by Gedney; and that stones should be put down to mark the boundaries; which was done. These portions of the two roads are the same portions of roads described in the second part of the Enclosure award, and which are the subject of the above order of justices: and the justices therein divided the roads transversely in accordance with this agreement.

The roads were repaired respectively, according to the agreement,

until about four years since, when Gedney Fen refused to repair a part of The Lutton Road; and thereupon the said order was obtained.

The order, dated February 2d, 1847, recited an information laid at special sessions by the surveyor of Gedney, that there was a certain part of a highway called The Lutton Road, in length, &c., one side of which, adjoining to the parish of Gedney, lay within, and was to be, and of right ought to be, repaired by the said parish, and the other side, adjoining to the hamlet of Gedney Fen, lay within, and was to be, and of right ought to be, repaired by the said hamlet of Gedney Fen: information to the like effect as to the other road: allegation of inconvenience, &c., and prayer of apportionment, as in the Schedule, No. 12, to stat. 5 & 6 W. 4, c. 50. The order then stated proceedings of the justices thereupon, and hearing of the complainant and Perkins on summons: and went on to declare, adjudge, and order that the highways respectively should be divided, &c., and posts or stones *set up, &c., and
 *234] the highways repaired from time to time by the parish and hamlet respectively; according to the form No. 14, of the same schedule.

The respondents, on the trial of the appeal, proved that, before the enclosure, The Old Common was not rated to any parochial rates: that the allotments on The Lutton Road and The Public Road, in respect of messuages, &c., in that part of the parish of Gedney, called Gedney, were, and since the enclosure had been, assessed to, and had paid, all the poor-rates, land tax, and highway rates of Gedney: and the like proof was given, mutatis mutandis, as to the allotments in respect of messuages, &c., in Gedney Fen. The appellant proved a decree of the Court of Exchequer, 30 Ch. II., by which, after certain disputes, The Old Marsh (being part of a more extensive marsh district) was allotted to be for ever held and enjoyed by the freeholders, copyholders, and commonable inhabitants in Gedney parish, their heirs and assigns, for a common of pasture; and that the said freeholders, &c., throughout the whole parish, as well in Gedney Fen as in Gedney, enjoyed equal commonable rights over the said Old Common previously to the enclosure.

The case concluded as follows:

On the part of the appellant it was on the trial of the appeal admitted that the order itself was correct in form, provided the magistrates had authority to make it under the circumstances: but it was contended, and it is now alleged, that neither side of the said road so set out as aforesaid by the said Enclosure Commissioners, upon the said Old Common, otherwise The Common Marsh, and called by them The Public Road, nor either side of the said road so set out, &c. (The Lutton
 *235] *Road), lie within the said hamlet of Gedney Hill: and that the said hamlet of Gedney Hill ought not to be made liable to the repair of the said roads, either wholly or in part; and that therefore the said order of justices appealed against is bad. The Court of Quar-

ter Sessions were of opinion that The Lutton Road had, before the date of the order appealed against, by user and dedication, become a public road. The respondents allege the contrary.

If the Court of Queen's Bench shall be of opinion that, under the circumstances stated, the roads in question could be divided transversely by the said order of justices, under the provisions of the General Highway Act, 5 & 6 W. 4, c. 50, the order of sessions to be confirmed: If not, the said order of justices, and also the said order of Sessions, to be quashed.

Willmore, in support of the order of Sessions.—The justices had power to make this order under stat. 5 & 6 W. 4, c. 50, s. 58. First: though it is not expressly stated in the case that a boundary ran across or through the middle of either highway, the Court will infer from the order itself that the justices who made it had that point under consideration, and have found that the boundary did so run; *Regina v. Hickling*, 7 Q. B. 880 (E. C. L. R. vol. 58). That was the case of an order not appealed against: here there has been an appeal, and the Sessions have confirmed the order, and thereby shown their concurrence in the finding of the justices. Although this Court might differ from them on the evidence they have set out, their judgment is [*286 *conclusive; *Rex v. Ronton Abbey*, 2 T. R. 207. This Court will not look at any question which the case does not expressly raise: *Regina v. Hartpury*, 8 Q. B. 566 (E. C. L. R. vol. 55). [COLERIDGE, J.—If the right to make the order depends upon the question whether a certain part of The Old Common is in Gedney, or Gedney Fen, is not that the very question which the Sessions put to us?] The facts they state do not disprove the existence of a boundary in the required position. There may be insulated portions of parishes, as there are of counties. (The further argument on the facts is omitted.) But, secondly, whether a boundary passes through these roads or not, the justices had jurisdiction by the proviso of sect. 58, which authorizes an apportionment in the case of any highway, the repair of any part of which belongs to any body politic or corporate, or person, by tenure of lands or otherwise howsoever. [COLERIDGE, J.—That does not interfere with the previous enactment as to boundary, but only provides for the case where the boundary is not between parishes, but between a parish on one side and a body corporate or an individual on the other.] It applies to all cases of divided liability, as did stat. 34 G. 3, c. 64, s. 5, now repealed. The intention, in stat. 5 & 6 W. 4, c. 50, s. 58, was to embody the principal enactments of that statute.

Whitehurst, contra.—The justices have power to divide the highway if there be a boundary line upon it; not otherwise, either by the principal enactments or by the proviso. Sect. 5 of stat. 34 G. 3, c. 64, cannot aid the respondents, if it be not expressly re-enacted. [*237 *The roads in question here may be extraparochial: they are

not found by the case to be in either Gedney or Gedney Fen. Had the Sessions expressly found either fact, their finding might have been conclusive: but they refer the matter to the Court. [COLERIDGE, J.—In *Regina v. Hickling*, 7 Q. B. 880 (E. C. L. R. vol. 53), the justices did not find as a fact that part of the highway was in either parish; but PATTESON, J., said: “The statute giving a form, I think their finding according to it may be taken to involve the proposition. Had the form been their own, and not a parliamentary one, I should have felt some difficulty.” Here a statutory form is followed.] The Sessions have, in effect, left it to this Court to decide whether the road runs upon a boundary, and whether it is a road which can be divided under sect. 58. There is no express adjudication, as in *Rex v. Ronton Abbey*, 2 T. R. 207. [WIGHTMAN, J.—*Regina v. Hickling* was the case of an indictment upon an order unappealed against. Here an appeal has taken place, and the Sessions have inquired into all the facts; and then they put a question to us. If their confirmation of the order is an implied finding of all the facts necessary to give the two justices jurisdiction, I do not see what their question to this Court is. ERLE, J.—I suppose they ask whether there be, in the opinion of the Court, any evidence on which the order can be sustained.] On the case stated there is no evidence to charge Gedney Fen. [COLERIDGE, J.—It may have been argued at the Sessions that the order was good under the clause, or else under the proviso: and they may have intended to ask us whether there is any evidence to support the adjudication under either.]

*238] *In any point of view the evidence is insufficient. (He was then stopped by the Court. *Macaulay*, on the same side, was not heard.)

COLERIDGE, J.(a)—If all that the Sessions meant was to ask us whether there was any evidence by which the order could be supported under the enacting part of the statute, we all think there was none. To the jurisdiction under that enactment the existence of a boundary on the highway to be divided is a condition precedent. Here nothing is found by which that fact appears; but rather the contrary. (His Lordship then commented on the findings in the case.) Our doubt has been, whether the question was not altogether one of fact, on which we were not bound to decide. It seems to have been put at the Sessions, first, that, on the facts proved, there was such a boundary as is requisite to the jurisdiction under the direct enactment of sect. 58; and, secondly, that at all events the proviso applied, and, that being so, the boundary was not a condition precedent; and the Sessions may have intended to ask us whether, taking the case either way, a jurisdiction is established. Taking the question so, I think Mr. *Willmore* is wrong as to the effect of the proviso. Referring to the forms in the Schedule (b) of stat. 5 & 6 W. 4, c. 50, I find that the existence of a boundary is

(a) PATTESON, J., was absent.

(b) No. 12, No. 14.

necessary in a case under the proviso as well as under the enacting part; only the litigating parties are different in the two cases. And it would be strange to say that, in the proviso, a parish was comprehended under the word "person;" yet that is the only word applicable. Another difficulty *is in saying how a parish could be bound to repair *ratione tenuræ*, or by any liability *ejusdem generis*. The [*239 respondents, therefore, are not helped by the proviso.

WIGHTMAN, J.—On the hearing of this appeal the parties went into the facts supposed to warrant the order. I can only suppose that the Sessions meant to find this a public road, and refer it to us, whether, upon the facts which they state, the magistrates were warranted in making the order. I think that there was no evidence of the whole or half of either road being in Gedney Fen, but rather evidence to the contrary: and that there was no evidence to bring the case within the proviso of sect. 58, or warrant the interposition of the two justices.

ERLE, J.—I think the question submitted is, in effect, whether there was any evidence that one half of the highway was in one hamlet, and the other half in another: and I find no evidence for the affirmative. As to the proviso: though, as at present advised, I think it may apply where the highway does not run upon a boundary, yet I find nothing in this case of the obligations, in the nature of exception to common law liability, which are necessary in order that the proviso may attach; nothing to warrant imposing the liability pointed out by the order upon Gedney Fen. I therefore think that, on the evidence, there was no ground for the order of justices.

Rule absolute to quash the orders.

*MARY FRANCES HOWLEY, Executrix of WILLIAM, Archbishop of CANTERBURY, v. HENRY KNIGHT and [*240 ROBERT KNIGHT. *Nov.* 16.

A bond given to the Ordinary by an administrator, under the Statute of Distributions (22 & 23 C. 2, c. 10), passes, on the Ordinary's death, to his personal representative, and not to his successor.

DEBT on bond made by the defendants and one John Young, since deceased, to the testators, his executors, &c.

The defendant Robert Knight craved oyer of the bond, which was set out as follows.

"Know all men by those presents that we, John Young, of," &c., "Henry Knight, of," &c., "and Robert Knight, of," &c., "are become bound unto the most reverend Father in God, William, by Divine Providence Lord Archbishop of Canterbury, Primate of all England, and Metropolitan, in the sum of 16,000*l.* of good," &c., "to be paid to the

said most Reverend Father in God, his certain attorney, executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, and every of us, for the whole, our heirs, executors, and administrators, firmly by these presents. Sealed," &c. "Dated the 21st day of January, A. D. 1833."

He also craved oyer of the condition, which was set out as follows.

"The condition of this obligation is such that, if the above bounden John Young, the natural and lawful brother, next of kin, and administrator of all and singular the goods, chattels, and credits, of James Young, late of," &c., "deceased, do make, or cause to be made, *241] *a true and perfect inventory of all and singular the goods, chattels, and credits of the said deceased which have or shall come to the hands, possession, or knowledge of him the said John Young, or into the hands and possession of any other person or persons for him, and the same so made do exhibit or cause to be exhibited in the Registry of the Prerogative Court of Canterbury at or before the last day of July next ensuing, and the same goods, chattels, and credits, and all other the goods, chattels, and credits of the said deceased, at the time of his death, which at any time after shall come to the hands or possession of the said John Young, or into the hands or possession of any other person or persons for him, do well and truly administer according to law, and further do make," &c., "or cause to be made, a true and just account of his said administration, at or before the last day of January, which shall be in A. D. 1834, and all the rest and residue of the said goods, chattels, and credits, which shall be found remaining upon the said administrator's account (the same being first examined and allowed of by the Judge or Judges for the time being of the said Court) shall deliver and pay unto such person or persons, respectively, as the said Judge or Judges, by his or their decree or sentence pursuant to the true intent and meaning of an act of parliament, (a) intituled 'An Act for the better settling of intestates' estates,' shall limit and appoint; and, if it shall hereafter appear that any last will and testament was made by the said deceased, and the executor or executors therein named *242] do exhibit the same in the said Court, making request to have it *allowed and approved accordingly, if the said John Young, being thereunto required, do render and deliver the said letters of administration (approbation of such testament being first had and made) in the said Court, then this obligation to be void and of none effect; or else to remain in full force and virtue."

Defendant Robert Knight then pleaded: That the said writing obligatory in the declaration mentioned was a writing obligatory taken and made according to the statute, &c. (22 & 23 C. 2, c. 10), and in pursuance of that statute, upon the granting and committing administration by the said most Reverend Father in God in the declaration mentioned,

(a) 22 & 23 C. 2, c. 10.

by virtue of his archiepiscopal office and station therein also mentioned, after the 1st day of June, A. D. 1671, to wit, on, &c., of the goods of one James Young, then dead intestate, to the said John Young in the declaration mentioned; and that the said writing obligatory was so made as in the declaration mentioned, by the defendants, as sureties in that behalf, according to the said statute, to the said most Reverend Father as the Ordinary in that behalf, according to the said statute. Verification.

Special demurrer, assigning grounds which, so far as is material to the decision, appear by the arguments. Joinder in demurrer.

Whitehurst, for the plaintiff.(a)—The plea offers no answer to the declaration. The declaration shows that the bond is given to the Archbishop and his executors: then, the condition appearing, upon oyer, to be for duly administering and accounting for the testator's goods, *the plea states that the bond was given, under the Statute of [*243 Distributions, to the Archbishop, upon his granting administration by virtue of his archiepiscopal office. It is not alleged that the bond was void by reason of duress or extortion colore officii. [*Willes*, for defendant, said that he did not propose to contend that the bond was void on that ground.] Then the defendant must impeach the declaration. It may be doubted whether the declaration, by itself, shows that the bond was given under the statute, even after the setting out on oyer. But the question substantially is, whether the right of action upon a bond so given passes, after the death of the Ordinary, to his executor or to his successor. Before the Statute Westm. 2 (1 stat. 13 Ed. 1), the goods of the intestate went to the Ordinary. C. 19 of that statute directed that the Ordinary should answer the debts of the intestate, as far as the goods would extend. Then 1 stat. 31 Ed. 3, c. 11, enacted that the Ordinary should depute the next friends of the intestate to administer, and gave to the administrators an action for debts due to the intestate, making them accountable to the Ordinary like executors.(b) Then stat. 21 H. 8, c. 5, s. 3, directs that the Ordinary shall take surety of the administrator. By the Statute of Distributions, 22 & 23 C. 2, c. 10, s. 1, it is enacted that the Ordinary shall take bond of the administrator with two sureties; and sect. 2 prescribes the form of the condition: but the form of the obligatory part of the bond is not prescribed. As far as can be ascertained, the bonds have been always taken *in the present form: the earliest [*244 which has been found is dated 1718. Although the statute does not prescribe the form, it should seem that the Ordinary must take it either simply to himself or to himself and his executors. In *Edwards v. Freeman*, 2 P. Wms. 435, 441, Sir JOSEPH JEKYLL, M. R., says: "The

(a) The argument commenced on November 13th in this term, before the same Judges.

(b) As to the law before this statute, and the change effected by the statute, see *Hensloe's Case*, 9 Rep. 36 b, 38 b, and *Dyke v. Walford*, 5 Moore's P. C. C. 434, 438-494.

occasion of making the statute of distribution, was to put an end to the long contest which had been betwixt the temporal and spiritual courts, for when the spiritual courts ordered any distribution, or bond to be given by the administrator for that purpose, the temporal courts sent a prohibition, being of opinion that the administrator had a right to all, and that the spiritual court could not break into that right; and so this statute was made in favour of the practice of the spiritual court, which proceeded to order distribution as often as the common law courts did not prohibit them." An instance of such a prohibition occurred in *Hughes v. Hughes*, 1 Lev. 233. The rights of the Ordinary were no further altered by the statute. Now, the Ordinary being a corporation sole, not representing an aggregate of persons, his choses in action would pass to his executor, and not to his successor; 2 Blackst. Com. 431, Co. Lit. 46 b.; (a) a rule which prevails as to a corporation sole though the grant be expressly to the corporator and his successors, except where (as in the case of the Chamberlain of London) there is a special custom. The reason is, that in the case of a corporation sole, the right, if it went to the successor, would be suspended at the corporator's death, and, when once suspended, would not revive. The authorities are collected in the margin of Fulwood's *Case, 4 Rep. *245] 64 b, 65 a. [COLERIDGE, J.—Is the rule applicable where the archbishop takes the grant *virtute officii*?] Suppose the Archbishop of York were translated, after taking such a bond: he would still be the person to sue: the bond here is given, not to the archbishop for the time being, but to William, Archbishop, &c. [COLERIDGE, J.—A case is mentioned in 1 Inst. of land being given to "George Bishop of Norwich," where the bishop's name was John, and yet he is said to take by his title.(b)] That was a mere case of *falsa demonstratio* as to the person meant. In *Arundel's Case*, Hob. 64, 5th ed., it is laid down that "a succession in one person of chattels will not be presumed without special allegation, except in case of abbot or prior, or the like corporation known in law to rest in one person, as well for chattels as inheritances, for otherwise bishops, deans, parsons, vicars, and the like cannot take obligation to them and their successors, but they will go to the executors." The question, whether successor or executor shall take, is put in an Anonymous (c) case in *Dyer*, where opposite answers are given; but the right answer, as appears by the note there, is clearly that which agrees with the rule in *Arundel's case*, which is also assumed in *Bird v. Wilford*, Cro. Eliz. 464 (bis).(d) No inconvenience arises from the rule. The executor will sue as trustee. The practice is to apply to the Ecclesiastical Court, in the registry whereof the bond remains, to have it "attended with," on its being put in suit: and this

(a) See also Yearb. Pasch. 20 E. 4, fol. 2 A, pl. 7.

(b) Co. Lit. 3 a.

(c) 1 *Dyer*, 48 a. pl. (15).

(d) See *Graves v. Colby*, 9 A. & E. 356 (E. C. L. R. vol. 36).

is granted upon the obligee being indemnified. That was done in the present case. *Afterwards a bill is filed in Chancery to compel distribution. There are cases of other bonds given to bishops [*246 in the ecclesiastical courts; which, however, show no more than that the bishop may take a bond to himself for the performance of a duty by the obligor, though not within stat. 21 H. 8, c. 5, s. 3; *Folkes v. Docminique*, 2 Str. 1187, *Bishop of Carlisle v. Wells*, 2 Lev. 162, in which last case it was questioned whether the bishop, though he could take a bond to himself, could take one to himself and his commissary. From the time preceding the Statute of Westminster the Second the Ordinary has always been a trustee; and the statutes make no difference as to this; 2 Inst. 398. It is true that the Ordinary takes *virtute officii*: but that does not affect the devolution of the chose in action to his executor. If an advowson belongs to a prebendary in right of his prebend, and he dies after there is a vacancy and without presenting, his executor presents, not his successor; *Mirehouse v. Rennell*, 8 Bing. 490 (E. C. L. R. vol. 21). (a) [WIGHTMAN, J.—The prebendary there took a beneficial interest. COLERIDGE, J.—The vacancy was a fruit fallen. WIGHTMAN, J.—Suppose the obligor has not accounted in the lifetime of the Ordinary who is obligee; cannot the succeeding Ordinary call the obligor to account under sect. 3 of stat. 22 & 23 C. 2, c. 10?] That may be doubted: but the question here is as to the right on the bond. A bail-bond taken by the sheriff under stat. 23 H. 6, c. 10, s. 1, does not pass to his successor: and the remedy upon it was only by action in the name of *the sheriff or his executor, till stat. 4 Ann. c. 16, s. 20, enacted that the bond might be assigned to the plain- [*247 tiff. (b) So the replevin bond, under stat. 11 G. 2, c. 19, s. 23, does not pass to the successor of the sheriff, though it may be assigned to the avowant or conusor.

Willes, *contra*.—The plea raises the question whether a bond given under stat. 22 & 23 C. 2, c. 10, passes to the successor or the executor of a deceased Ordinary. It was not necessary that the plea should describe the bond more specially; *Lewis v. Parker*, 3 M. & W. 133.† It is an incorrect statement of the law to say that the chattels of a corporation sole pass to executors and not to successors. The general rule is that a corporation sole, as such, cannot take chattels at all: but, where there is such power, they may be purchased to the corporation and successors; *Com. Dig. Capacity* (A 2). The Chamberlain of London has power to take by custom; the Ordinary by statute: in one case as well as the other the chattel goes to the successor, the corporation sole being thus placed in the predicament of a corporation aggregate. In *Co. Lit.* 8 b, it is said: “A chantry priest incorporate took a lease

(a) In *Dom. Proc.* affirming the judgment of K. B. in *Rennell v. Bishop of Lincoln*, 7 B. & C. 113 (E. C. L. R. vol. 14), which reversed that of C. P. in *Rennell v. Bishop of Lincoln*, 3 Bing. 223 (E. C. L. R. vol. 11).

(b) See *Hange v. Manning*, *Fortesc.* 364.

to him and his successors for a hundred years, and after took a release from the leasor to him and his successors; and it was adjudged, that by the release he had but an estate for life, for he had the lease in his natural capacity, for it could not go in succession, and (his successors: *248] gave him no estate of *inheritance for want of these words (his heirs)." Therefore the question was as to his having the power to take at all in a corporate character, not whether, if he could so take, the chattels would go to his successor or his executor. And so it is explained in Hargrave's note (1): "The reason is, because a chantry priest was a corporation sole, which regularly could not take in succession chattels real or personal, in possession or action, though a corporation aggregate may." Then, after mentioning the right of the Chamberlain of London by custom, the annotator adds: "Also in some instances, particularly of chattels in action, the law is the same without a custom;" referring to 1 Rol. Abr. 515, *Corporations* (L), pl. 3, 5, and 6 Vin. Abr. 294, *Corporations* (L), in which latter book many authorities are collected. Among these is the case mentioned in placitum 6, from Corven's Case, 12 Rep. 105, 106,(a) of the ornaments of the chapel of a bishop, which go to the successor. [COLERIDGE, J.—That may be on the principle that they belong to the chapel rather than the bishop, as the crown jewels go to the sovereign's successor, according to placitum 9.] The crown jewels are heirlooms of the crown; and, in the case of the crown, the successor has the character of heir. But the ornaments of the chapel can hardly fall within the principle suggested: if they were appurtenant to the chapel they would go to the successor of course, and the case would not have been mentioned as a special one. The chattels of an abbot, belonging to him as such, go to his successor. [COLERIDGE, J.—Not, as I understand the authorities, to a successor properly so *249] *called. The abbot holds for his house; and the house remains one identical body.] That shows that the Court are to ascertain in what character, and to what end, the corporation holds. In Thomson's Entries (Liber Placitandi), p. 134, tit. *Dett* (49), is a precedent of a declaration by the Chamberlain of London on a bond given to his predecessor; and the averment of the custom is: "quod quilibet Camerarius civitatis prædictæ pro tempore existens fuit et adhuc est unum corpus incorporatum per nomen Camerarii civitatis London ac per totum tempus prædictum habuit et adhuc habet successionem perpetuam ac fuit et adhuc est persona habilis et capax in re facto et nomine ad recipiendum et acceptandum infra eandem civitatem sibi et successoribus suis omnes obligationes quascunque," &c. In *Termes de la Ley*, tit. *Corps politique*, the reason of this custom that obligations given to the Chamberlain of London go to the successor is thus given: "Et tiel custome est foundue sur grand reason; car les executors ou administrators del Chamberlain ne doient entermeddle ove tiels recognisances,

(a) Citing Yearb. Mich. 21 E. 3, fol. 48 B, pl. 73.

obligations, &c., queux per le dit custome sont prise en le corporate capacity del Chamberlain, et nemy en son private." That applies to the bonds given to the Ordinary under the statute. In 1 Kyd on Corporations, 77, the author, after adverting to a distinction suggested by Lord COKE, as to the capacity of holding personalty in succession, between corporations by prescription and corporations by custom, says: "But the reason does not seem to depend so much on the corporation being by prescription or by custom, as on his being a trustee or not, and taking for his own benefit, *or for the benefit of another." [*250 The case of the College of Physicians (a) is thus stated in 1 Williams Ex. 714 (4th ed.), Part II. B. iii. ch. 1, s. 2, "By the charter granted to the College of Physicians, and confirmed in Parliament, the offenders in practising physic in London without admission by the College of Physicians, shall forfeit 5*l.* for every month, *unum dimidium regi et alterum dimidium dicto presidenti et collegio*; on this charter it was holden that if the President of the College recovers in debt against an offender and dies, the successor shall have a scire facias to execute it, and not the executor; for the predecessor recovered it as due to him and the College." The resulting principle is this: that a corporation sole can, in that capacity, take chattels only for the benefit of the public at large or of some limited body: and that, when it does so take, they go to the successor. The question therefore is, in what capacity the Ordinary takes this bond. Now he has capacity to do so, as Ordinary, by stat. 22 & 23 C. 2, c. 10. [WIGHTMAN, J.—Could he not do so at common law?] That was matter of dispute, as appears from the language of Sir JOSEPH JEKYLL, cited on the other side. By sect. 1 of the statute, the Ordinary is to take the bond, by which the commissary is excluded (though before the statute it was otherwise): now the Ordinary, thus mentioned, is the corporation sole: this is therefore a case of capacitating a corporation sole to take the chattel. And sect. 3 provides that "the said Ordinaries," &c., may call the administrator to account: the ordinary who holds the bond is therefore to be the *same authority which can call for the account: that is, the Ordinary for the time being. In Archbishop of Canterbury v. House, 1 Cowp. 140, it was distinctly laid down by Lord MANSFIELD that the Ordinary, in his private person, has nothing to do with the bond. The course of proceeding is described by Sir JOHN NICHOLL in Younge v. Skelton, 3 Hag. Ecc. Rep. 780. It appears from The Archbishop of Canterbury v. Tubb, 3 New Ca. 789, that the Ecclesiastical Court keeps possession of the bond. The Ordinary has power, in the Ecclesiastical Court, to compel an account from the principal; but, in carrying out the power which the bond gives him over the sureties, he exercises a discretion in that Court, compelling them to pay only what may appear to be required by justice, but not enforcing the full legal

(a) Dr. Atkins v. Gardener, Cro. Jac. 159.

remedy to the extent to which the principal is liable. *Murray v. M'Inerheny*, 1 Curt. Ecc. R. 576, is an instance. This discretion will be taken out of the hands of the Ordinary, if the executor of the deceased Ordinary is to enforce the bond. As to the word "executors," in the obligatory part of the present bond, that will be rejected if, under the statute, the bond cannot pass to the executors; 16 Vin. Abr. 61, tit. *Obligation* (M) pl. 5.(a) [COLERIDGE, J.—That would be so, undoubtedly, just as "successors" would be rejected if it passed to the executors. But is it not a strong circumstance against you that the bond to the Archbishop appears to have been always made in this form?] During the vacancy of an archbishopric, the Dean and Chapter of his diocese are *252] guardians of the spiritualities, and the bond *must be given to them; Jenkins, 202, Cent. V. case 23; 1 Burn, Ecc. L. 225, tit. *Bishops*: in that case it must go in succession. In 2 Wilde's Suppl. to Barton's Precedents in Conveyancing, p. 78 (3d ed.), the bond is made to the Ordinary, "his executors, administrators, successors, or assigns." [WIGHTMAN, J.—Suppose the bond were given to William Howley, and it appeared, by proper averments in the plea, that it was a bond given to him as ordinary under the statute?] Then the effect would be the same as if he had been named Archbishop of Canterbury. The averment might easily be so framed as to show the fact; as, where an executor sues for rent due since the testator's death on a lease by the testator, it ought to be shown that the testator had only a chattel interest; 1 Williams Ex. 695 (4th ed.) Part II. B. iii. ch. 1, s. 2: though, according to *Bickerstaff v. Purdue*, 1 Sid. 218, that would be supplied after verdict. The material part of a bond is the obligatory part, not the solvendum; Shepp. Touchst. 369, 16 Vin. Abr. 62, *Obligation* (N), pl. 2, 3. [WIGHTMAN, J.—Suppose a bond were made to a corporation sole "and his successors," conditioned to pay an annuity for ninety-nine years: who would sue after the corporator's death?] The executors; because the corporator had no capacity to take as a corporation at all, and therefore it would be the case of a bond to a common individual. It would be a new exercise of the jurisdiction of a Court of Equity to compel the executors to sue on such a bond as this for the purpose of effecting distribution. At law, the executors might release the obligor.

*253] **Whitehurst*, in reply, was stopped by the Court.

COLERIDGE, J.(b)—Our judgment must be for the plaintiff. The question is, whether the personal representative, or the successor, of the deceased Ordinary is the proper party to sue on a bond given under stat. 22 & 23 C. 2, c. 10. It is admitted, as a general rule, that a corporation sole cannot take personal property to be held in succession. A bond given to a corporation sole and the successors would, if

(a) Citing *Langdon v. Goole*, 3 Lev. 21.

(b) PATTESON, J., was absent.

we knew no more of it, enure as a bond to the corporation and executors. The exceptions are all known, as in the case of the King, or under a custom. On the other hand, property given to a corporation aggregate does not go to executors, but is taken in succession. The principle, as laid down by Blackstone, in 2 Com. 431, seems to me reasonable. In the case of a corporation sole, the property would be in abeyance till the successor existed: the corporation aggregate always continues to be the identical grantee or purchaser. According to this, therefore, the executor would be the proper person to sue in the present case. But Mr. *Willes* argues that this is not the true principle, and that the rule rests on the incapacity of a corporation sole to hold personal property at all, in the corporate character, save in the excepted cases. Supposing him to be right, I do not see how his principle gets rid of the difficulty. He would have to show that in the present case there has in fact been a statute determining the transmission to the successor instead of the executor. Does the statute here give a capacity to the corporation sole *which would carry the property to the successor? The material part is very short; it merely enacts (22 [*254 & 23 C. 2, c. 10, s. 1) "that all ordinaries," specifying them, "shall and may upon their respective granting and committing of administration of the goods of persons dying intestate," "take sufficient bonds," &c., "in the name of the Ordinary," "of the respective person or persons to whom any administration is to be committed." Nothing is said about the successor. Is it necessary that the successor should take the bond? The answer is supplied by the practice of the Ecclesiastical Courts, under which the bond in the hands of the executor is completely effective. I do not attach much weight to the argument that the succeeding Ordinary has, by his Court, the control over the bond. And the practice has in fact been always to give the bond, when the Archbishop is the acting Ordinary, to the Archbishop himself, his executors and assigns, as far as it can be traced: but, when the bond is given to the Dean and Chapter, then it is always given to them and their successors. Thus the distinction commonly laid down has always been acted upon. Has any inconvenience resulted? None appears; and it would be rather late if we were to discover one now. But why should there be any? Either way, the Judge whose Court has custody of the bond exercises the same jurisdiction; the plaintiff is a mere nominal party, the Ecclesiastical Court using, as its instrument, the personal representative or the successor. The burthen of the argument is undeniably thrown upon Mr. *Willes*; and he has been able to do no more than offer some very ingenious suggestions, and has found it impossible to produce any authority.

*WIGHTMAN, J.—I am of the same opinion. A personal contract with a corporation sole, though made, not for his personal [*255 benefit, but for that of himself and his successors, would pass to his

executors. Here the bond is made to a corporation sole. But it is said that a distinction arises from the circumstance that a bond given under the Statute of Distributions is to have a permanent effect, and not to be merely carried out in the time of the existing Ordinary; and therefore that, after his death, contrary to the ordinary rule, the right of action should pass to the successor, not to the executor, because of the great inconvenience that would arise in case of a conflict between the executor and the Court which desired to give effect to the bond. I confess I do not feel this difficulty; nor can I see why the ordinary rule should not prevail. The bond, when taken, will be subject to the ordinary rule: it is to be presumed that it will be put in suit; and here it is in fact put in suit, by the authority of the Ecclesiastical Court. I therefore see no reason for taking the case out of the ordinary rule of law.

ERLE, J.—At the time when the Statute of Distributions passed, a bond in this form passed to the personal representative. The only question is, whether the statute has altered that. It is said that we must read the statute as if it directed the bond to be given to the Ordinary and his successors: but that can be done only by adding words which we do not find there, for the purpose of contradicting the ordinary rule. The bond therefore passes to the personal representative.
Judgment for plaintiff.

***256] *ELEANOR WILSON, Widow, v. Sir WILLIAM EDEN,
Baronet, and Others.(a) Nov. 16.**

Testator J. devised lands to his wife for her life; remainder to his daughter and only child E. for her life; remainder to her eldest son R. for his life; remainder to the first son of the body of R. and the heirs of the body of such first son; and, in default of such issue, to the second, third, and every other son of the body of R., severally and successively, with like remainders over: remainder, failing such issue of R., to the second son of E. for his life, in case he should not become, or should not continue, seised of the real estates of M. D. deceased, under M. D.'s will, with like remainders over, subject to the same condition: remainder, failing such issue of the second son, to the third and every other son of E., severally and successively, with like remainders over, subject to the same condition.

It was then declared by J.'s will that, if the said second son of E. or any son of the said E., should at any time become seised of the real estates of M. D. by virtue or in consequence of his will, such son should not, nor should any heir of his body, take, have, or enjoy any estate or interest in the now devised estates, so long as he should be so seised, but the same should go over to the next in succession of E.'s sons, and the heirs of his body, as if the son so seised of the estates of M. D. were dead without issue: but that, if such last-mentioned son should afterwards become disabled by any condition in the will of M. D. from continuing to hold his estates, then, as soon as he should have quitted possession thereof, he should and might have, hold, and enjoy the now devised estates according to the above limitations. Then came the following clause.

Provided that, if my said daughter (E.) "shall have no issue male of her body living at her death, or no such issue male as shall be entitled by the true meaning of this my will to my

(a) For the rest of the parties, see p. 265, post.

real estates hereby limited and settled as aforesaid, then and in either of those cases I devise all my said real estates, subject respectively as aforesaid, to all the daughters, if more than one, of the body of my said daughter, who shall be living at her death, as tenants in common, and their heirs respectively, with cross remainders" in case of any one or more of them dying under the age of 21 without issue; "and, if there should be but one such daughter living at my said daughter's decease, and no issue of any other such daughter then in being, then to such only surviving daughter and her heirs." Then followed a provision for the case of daughters dying in E.'s lifetime, leaving issue: and, in case E. should have no issue of her body living at her death, devise to such person and for such estate, as E. should by deed or will appoint. Devise, for want of such appointment, and subject thereto, and to the several limitations and charges of the will, to testator's right heirs. And all the residue of his estate, not before effectually disposed of, testator gave to his said wife.

M. D., by his will (prior to that of the above testator), devised his lands to his nephew Sir J. E., Baronet, the husband of J.'s daughter E., for his life, remainder to the second and all the other sons of Sir J. E. (excluding the eldest), severally and successively, according to priority of birth, and to the heirs male of the bodies of such sons (excluding the eldest son, as above), respectively; remainders to the other nephews of M. D. in succession, with remainders to the first and other sons of each nephew, respectively, and the heirs male of the bodies of such sons, respectively: remainder to M. D.'s right heirs. Proviso, that, if the title of Baronet, vested in Sir J. E., should descend to his second or other son, or any person to whom the lands of M. D. were limited by his will, before or at the time when such son or person should be in possession, the whole estate and interest therein limited to him by M. D.'s will should cease as if he were dead, and the person next in remainder should be entitled to enter upon and hold such lands.

The wife of J. the first-mentioned testator entered under his will, and held for her life. E., his daughter, died in his lifetime, intestate, having, at the time of her death, two sons and several daughters living. Her eldest son entered on the death of the testator's widow, and died without having had issue. The other son of E. was already deceased, not having had issue. Several of the daughters survived, and claimed the devised estates of J., against a devisee of the elder brother.

Held that, on a correct grammatical construction of the proviso in J.'s will, the devise to E.'s daughters took effect if E. should have no issue male of her body living at her death, or if, then or at any subsequent time, she should have no such issue male as would be entitled under J.'s will; the restrictive words "living at her death" not being common to both alternatives.

And that this construction agreed with the intentions of the testator J., to be inferred from the context of his will, the provisions in the will of M. D., and the other circumstances of the family.

THE Master of the Rolls sent the following case for the opinion of this Court.(a)

Peter Johnson, late of the city of York, Esquire, by *his will, [257 dated 1st February, 1779, duly executed and attested to pass freehold estates by devise, gave and devised to his wife and her assigns, during her life, in lieu of jointure and in bar of dower, his manor of Arkendale, in the county of York, and all his hereditaments and estate whatsoever at Arkendale aforesaid and in Arkendale Lofthouse and Minskip in the said county, without impeachment of waste, and with power to let leases without fines or foregift for any term or terms not exceeding seven years respectively in possession at the best rents which could be reasonably obtained. Also he devised to his said dear wife and her assigns, for her life, his new dwelling-house on Castle Hill at York (and other premises there, and certain closes, named in the will),

(a) See *Wilson v. Eden*, 1 Exch. 772,† where, on a case sent by Lord LANGDALE, Master of the Rolls, to the Court of Exchequer, that Court certified in favour of the defendants. The Master of the Rolls, upon further discussion (*Wilson v. Eden*, 11 Beav. 289), desired to have the opinion of another Court: and this case was accordingly sent to the Queen's Bench.

without impeachment of waste. And, after giving several life annuities, all of which have ceased and determined, and after providing for the payments in the said will directed to be made, and which payments have been made, and now no longer exist, the testator devised to his *258] said dear wife, for her life, all other his *real estates whatsoever and wheresoever, which he had power to dispose of, to hold to her and her assigns, without impeachment of waste, and with like power to let leases not exceeding seven years in possession, and with such restrictions aforesaid.

And, as to his said manor of Arkendale and his estate and hereditaments whatsoever, situate at Arkendale and Arkendale Lofthouse and Minskip aforesaid, with all their appurtenances, the said testator devised the same from and immediately after the decease of his wife, and, as to all his other real estate whatsoever and wheresoever which he had power to dispose of, whether freehold or copyhold, from and immediately after the decease of his wife, the said testator devised the same respectively to his dear daughter and only surviving child Dorothea, the wife of Sir John Eden, Baronet, for her life, without impeachment of waste. And, from and after the determination of that estate, he devised all the same premises to his good friends Sir Bellingham Graham, of Norton Conyers in the county of York, Baronet, and Henry Willoughby, of Birdsall, in the same county, Esquire, and their heirs, during the life of his said daughter, upon trust to preserve the contingent uses and estates thereafter limited from being defeated, and with all necessary and usual powers for that purpose; but nevertheless to permit and suffer his said daughter to receive the rents and profits of all the same estates to her own use during her life.

And, from and after the decease of his said daughter, he devised all the same estates to his grandson Robert Eden, eldest son of his daughter, for his life, without impeachment of waste. And from and after the *259] determination of that estate, he devised the same to trustees *as before, for the life of Robert Eden, upon trust to preserve contingent uses. And, from and after the decease of the said Robert Eden, he devised the same to the first son of the body of the said Robert and the heirs of the body of such first son lawfully issuing: and, in default of such issue, to the second, third, and every other son of the body of the same Robert, severally and respectively, and the heirs of the respective bodies of such second, third, and every other son, the elder of such sons and the heirs of his body always to be preferred and to take before the younger of them and the heirs of their bodies respectively. And, in default of such issue, he devised all the same real estates and premises to his grandson Morton John Eden, second son of his said daughter, for his life, without impeachment of waste, in case he should not become, or should not continue, seised of the real estates of Morton Davison, late of Beamish in the county of Dur-

ham, Esquire, deceased, by virtue or in consequence of his will: and, from and after the determination of that estate, he devised, &c.: as before, to support contingent uses. And, from and after the decease of the said Morton John Eden, he devised the same (upon the conditions aforesaid) to the first and every other son of the body of the said Morton John Eden severally and successively, and to the respective heirs of the bodies of such first and every other son lawfully issuing, the elder of such sons and the heirs of his body always to be preferred and to take before the younger of them and the heirs of their bodies respectively. And, for default of such issue, he devised the same real estates and premises, upon the like condition as aforesaid, to the third and every other son of his said daughter, *begotten or to be begotten, [260 severally and successively, and the heirs of the body and bodies of such third and every other son lawfully issuing, the elder of such unborn sons, and the heirs of his body, always to be preferred and take before the younger of them and the heirs of his or their bodies respectively.

And the said testator declared and provided that, if the said Morton John Eden, or any son of his the testator's said daughter, should at any time during his life become seised of the real estates of the said Morton Davison by virtue or in consequence of his will, then the said Morton John Eden, or such son of the said testator's said daughter so becoming seised thereof, or any heir of his body respectively, should not take, have, or enjoy any estate or interest whatsoever in any of the said testator's real estates by virtue of his said will so long as he or they should be so seised of the real estates of the said Morton Davison, but the same should remain and go over, after the determination of the particular estates thereof thereby limited, to, and should be taken, held, and enjoyed by, the next son in succession of the testator's said daughter, and the heirs of his body, in the same manner as if such son so seised of the real estates of the said Morton Davison was dead without issue. But, if it should happen that the said Morton John Eden, or any such son who could or might become seised of the said real estates of the said Morton Davison, should afterwards become disabled by any condition or proviso in his will from continuing to hold and enjoy the same, then, and as soon as the said Morton John Eden, or any such son of the said testator's said daughter, should have quitted the possession, and should be no longer in the receipt of the rents and *profits, of the real estates of the said Morton Davison in conformity to any such condition or proviso in his will, the said [261 Morton John Eden and the heirs of his body, or any such son of the said testator's daughter so circumstanced, and the heirs of his body, should and might have, hold, and enjoy all the said testator's real estates thereby intended to be limited and settled as aforesaid, and according to the limitations thereof thereinbefore contained.

And then the will of the said testator contained certain provisoes and limitations which are in the words and figures following: that is to say:

"Provided always, that, if it shall happen that my said daughter shall have no issue male of her body living at her death, or no such issue male as shall be entitled by the true meaning of this my will to my real estates hereby limited and settled as aforesaid, then and in either of those cases I devise all my said real estates, subject respectively as aforesaid, to all the daughters, if more than one, of the body of my said daughter, who shall be living at her death, as tenants in common, and their heirs respectively, with cross remainders amongst them in case of any one or more of them happening to die under the age of one-and-twenty years and without issue: and, if there should be but one such daughter living at my said daughter's decease, and no issue of any other such daughter then in being, then to such only surviving daughter and her heirs. Provided always, that, if any such daughter or daughters of my said daughter shall happen to die in her or their said mother's lifetime leaving issue, then my will is that such issue of each such daughter so dying, and the heirs of such issue *262] respectively, shall have and take the same *estates, or share or shares of estates, as the parent or parents of such issue respectively would have been entitled to if she or they had been living at the decease of my said daughter. And, in case my said daughter should have no issue of her body living at her death, then I devise all such my real estates, from and after the determination of the particular estates hereinbefore thereof limited as aforesaid, to such person or persons, and for such estate and estates either in fee simple or otherwise, and in such manner, as my said daughter, whether married or sole, shall by any deed or deeds executed in the presence of two credible witnesses, or by her last will and testament in writing, or any writing in the nature of a will, signed in the presence of three such witnesses, direct or appoint. And, for want of any such appointment, and subject thereto, and to the several limitations and charges in this my will, I leave all such real estates to descend to my own right heirs."

And all the residue of his estate real and personal not therein before disposed of, or not fully and effectually disposed of, the said testator gave to his said dear wife.

The testator made several codicils to his said will, (a) *but did *263] not thereby alter the limitations of the real estates contained in

(a) The following bequest, in a codicil, dated 1st February, 1779, to the will of Peter Johnson, was not set out in the case, but was noticed in argument for the plaintiff as showing the view which the testator himself took of the effect of the proviso.

"And I also give to my dear wife for her life, and at her death to my grandson Robert Eden, the large gilt cup and cover presented to me by the Corporation of York, which I desire may be preserved in the Eden family and go to the heir male of that family being descended from my daughters for the time being; and on failure of such heir male to go to my granddaughters successively, according to seniority of age, and their issue respectively, as long as the law will permit."

his will above set forth; and died in the year 1796, without having revoked or altered any of the aforesaid limitations.

Dorothea Johnson, the wife of the testator Peter Johnson, entered into the possession of the said estates so devised to her as aforesaid for her life, or into the receipts of the rents and profits thereof, and continued in such possession or receipt until her death, which took place in 1810.

Lady Eden, the only child of the testator Peter Johnson, died in his lifetime, in June, 1792, intestate, having had two sons; namely, Sir Robert Eden, afterwards Sir Robert Johnson Eden, Baronet, her eldest son and heir at law and customary heir; and who was also the heir at law and customary heir of the said testator Peter Johnson at the time of his decease; and the said Morton John Eden; and eleven daughters, namely Dorothea Eden, Maria Eden, Catherine Eden, Elizabeth Eden, Caroline Eden, Dulcibella Eden, Anne Eden, Emmeline Eden, Eleanor Eden, Harriet Eden, and Charlotte Eden; and no other children.

Elizabeth Eden, Caroline Eden, and Harriet Eden, all died in the lifetime of their mother, the said Lady Eden, under the age of twenty-one years, and without having been married: but Lady Eden's other daughters and her two sons survived her: and Dulcibella Eden and Anna Eden, having respectively attained the age of twenty-one years, died respectively in the year 1805, intestate as to real estate, and without having been married, leaving the said Robert Johnson Eden, their eldest brother, their heir at law and customary heir.

Upon or shortly after the death of Dorothea Johnson, *the [264 widow of the said testator Peter Johnson, Sir Robert Johnson Eden, Baronet (in the said will called Robert Eden), entered into possession of the freehold and copyhold estates by the said will devised to him for life, or into the receipt of the rents and profits thereof, and continued in such possession or receipt until his death.

Morton John Eden, on the death of his father Sir John Eden, became seised of the estates of the said Morton Davison referred to in the will of the said testator Peter Johnson, and died on the 28th of June, 1841, in the lifetime of his brother Sir Robert Johnson Eden, and without ever having had any issue.

Sir Robert Johnson Eden, Baronet, died on the 4th September, 1844, without having had any issue.

Dorothea Eden, the daughter, intermarried first with Henry Methold, and secondly with Daniel Seddon, both deceased; and she died in the year 1830, leaving Henry Methold, her eldest son, her heir at law and customary heir. Maria Eden intermarried first with Lord Aghrin (afterwards Earl of Athlone), and secondly with Sir W. J. Hope, G. C. B., both deceased; and she is now a widow. Catherine Eden intermarried with, and is now the wife of, Robert Eden Duncombe Shafto. Emmeline Eden intermarried with, and is now the wife of, Thomas

Northmore. Eleanor Eden intermarried with, and is now the widow of, the Rev. Thomas Fourness Wilson; and Charlotte Eden intermarried with, and is now the wife of, Robert Kaye Greville.

Sir Robert Johnson Eden, by his will dated in 1815, and which was afterwards republished by a codicil thereto in 1841, gave and devised all his estates, lands and hereditaments whatsoever and wheresoever in *265] Durham and York, and elsewhere in Great Britain, to *certain uses in his said will mentioned (but which have failed to take effect), with an ultimate limitation to the use of the said defendant Sir William Eden, his heirs and assigns for ever; and the said Sir William Eden, as such devisee, did, on the decease of the said Sir Robert Johnson Eden, enter into and is now in possession or receipt of the rents and profits of the estates devised by the will of the said Peter Johnson.

On the 20th February, 1845, a bill was filed in the High Court of Chancery by the said Eleanor Wilson against the said Sir William Eden, Baronet, Richard John Thompson, Henry Thompson, the said Robert Kaye Greville and Charlotte his wife, Maria Countess of Athlone, Robert Eden Duncombe Shafto and Catherine his wife, Thomas Northmore and Emmeline his wife, and Henry Methold, stating among other things the will of the said Peter Johnson, and praying equitable relief in respect of matters connected with his estate. The defendants put in their answers to this bill: and the cause, being at issue, came on to be heard before his Lordship the Master of the Rolls; when his Lordship directed a case to be stated for the opinion of the Court of Queen's Bench upon the following question:

Whether the daughters of Dorothea, the wife of Sir John Eden, Baronet, in the pleadings of the said cause named, or any and which of them, took any and what estate or interest in the estates devised by the will of Peter Johnson deceased, the testator in the pleadings of this cause named, or any and which of them.

It was agreed that the will and codicils of Peter Johnson and the will of Morton Davison should be considered as part of this case.

*266] *Morton Davison, by his will, (a) dated 9th November, 1769 (not set out in the case), devised all his freehold, copyhold, and leasehold manors, messuages, lands, &c., and hereditaments, after certain limitations in favour of his own issue, male and female, if any, to his nephew, Sir John Eden, Baronet, and his assigns, for his life; remainder in trust to preserve the contingent remainders after limited. And, from and after the decease of Sir J. Eden, then, in case he should have more than one son of his body lawfully begotten, to the second son of Sir J. Eden lawfully, &c., and the heirs male of the body of such second son, and, for default of such issue, to the third, fourth, and all and every other the son and sons of the body of Sir J. Eden, lawfully, &c., except his eldest son, severally, successively, and in remainder, one after an-

(a) See some clauses set out verbatim in the judgment, post, p. 279.

other according to priority of birth, and the respective heirs male of the bodies of every such third, &c., son and sons, except his eldest, the elder of such sons, and the heirs male of his body, being always preferred: And, for default of such issue of Sir J. Eden, then to testator's nephew, Robert Eden, Esquire, and his assigns during his life; remainder to preserve, &c.; and, from and after the death of Robert Eden, to the first son of the body of Robert and the heirs male of the body of such first son, with subsequent limitations to the second and other sons of Robert, as in the devise to the third and other sons of Sir John Eden; but omitting the exclusion of eldest sons. And, for default of such issue of Robert, to testator's nephew William Eden for his life (remainder to preserve, &c.); remainder to the first son of William with limitations over, as in the last preceding devise; remainder, for default of issue of William, to testator's *nephew Thomas for his life, [*267 with the like limitations over; remainder, for default of issue of Thomas, to testator's nephew Morton Eden for life, with like limitations over: And, for default of such issue, to testator's own right heirs for ever. Then (after a bequest of tithes and other property held on lease) came the following clause.

"Provided nevertheless, and my will is, that, for and notwithstanding anything hereinbefore contained to the contrary thereof, in case the title of Baronet, now vested in my said nephew the said Sir John Eden, shall descend and come to the second, third, or any other the younger son of Sir John Eden, or to any other person or persons to whom my said manors, messuages, lands, tenements, coal mines, collieries, tithes, and hereditaments are by this my will devised and limited, before or at the time when he or they or any of them shall be in the actual possession of my said manors, messuages, lands, &c., by virtue of the limitations in this my will contained, then and in such case, and from time to time and when and so often as the same shall so happen or be, the use, estate, and interest herein given and limited to such son or sons of the said Sir John Eden, or to such person or persons as aforesaid, on whom the said title shall descend and come, of and in my said manors, messuages, lands," &c., "shall from thenceforth cease and be utterly void as if such person was naturally dead; and that then and in every such case it shall and may be lawful to and for the person who by virtue of the limitations aforesaid shall be then next entitled in remainder to the said manors, hereditaments, and premises to enter into, and to hold and enjoy the same for and during the estate and interest hereby devised and limited to him therein as aforesaid."

*There was a further proviso, that, from and after the death of testator's nephew Sir John Eden, every person to whom the [*268 said manors, messuages, lands, &c., should come by the limitations of the will should, within three calendar months next after coming into posses-

sion, take the surname of Davison: in case of refusal or neglect, the estate of such person in the said manors, &c., to cease if he were dead, and the person next entitled to take, he assuming the said surname.

The case was argued on this and a subsequent day of the term. (a)

Humphry, for the plaintiff.—The will of Peter Johnson gave an estate in fee to the daughters of Lady Eden who survived her and the testator, as tenants in common, from the time when there ceased to be issue male of Lady Eden who could inherit the real estates. The case is peculiar: but the Court will adopt the principle of construction acted upon in *Doe dem. Dacre v. Dacre*, 1 B. & P. 250, (b) and will hold that the devise to daughters in the proviso continues the previous limitations by vesting a remainder in the daughters, and does not operate as an executory devise. The limitations, first to the sons of Lady Eden successively, and then to the daughters, form a regular series, interrupted, it is true, by the provision in case of the Davison estates devolving upon one of the sons; but this does not change the character of the subsequent limitations. It may be suggested as a difficulty that, in the commencement of the proviso, the word “male” is introduced: “Provided always that, if” “my said daughter shall have no issue male of *269] her body *living at her death, or no such issue male as shall be entitled,” &c. But this difficulty presses the defendants rather than the plaintiff. If by the words “issue male” is to be understood issue of a male, it means heirs of the body of a son; but it makes no difference to the argument for the plaintiff whether the daughters take in remainder on an estate tail so restricted or on a general estate tail: upon the facts of this case they are still entitled. “Issue male,” here, cannot mean sons; for then, if Lady Eden had had a son who died in her lifetime leaving issue, the estate must have been taken from them at her death, and transferred to the daughters. The only effect of the word “male” here is to cut down the estate tail general, given by the prior limitations, to a special estate tail; according to the rule stated in 2 Jarman on Wills, ch. 35, pp. 232, 3, 236, 7, and *Fitzgerald v. Leslie*, 3 Bro. P. C. 154, cited in the same volume, p. 239.

The plaintiff's view of the case agrees with the established general principles: That the Courts will not construe that to be an executory devise which may be a remainder; *Fearne*, Cont. Rem. 267, 385, note (b); nor that as contingent which may be vested; *ib.*, p. 378: and that a remainder shall not be construed as contingent after the earliest period at which it can vest; *Stert v. Platel*, 5 New Ca. 434: Also that words of devise shall be construed in their primary sense, unless there appear a manifest intention to the contrary; *Attorney-General v. Malkin*, 2 Phill. C. C. 64, 68; *Jesson v. Doe dem. Wright*, 2 Bligh, 1, 56, judgment of Lord REDESDALE: that, in reasonable intend.

(a) November 16th and 21st. Before COLERIDGE, WIGHTMAN, and ERLE, J.

(b) Judgment affirmed in Q. B.; *Lady Dacre v. Doe*, 8 T. R. 112.

ment, "a subsequent limitation is meant to take effect upon failure of the *prior gift, and is a substitution in that event;" *Malcolm v. Taylor*, 2 Russ. & Mylne, 416, 421; that, "where the general [*270 intent appears to make a strict settlement, though some one limitation may, according to the words, seem contingent, yet the general intent shall prevail;" *Lethieullier v. Tracey*, 3 Atk. 774, 781: and that, if dispositions in a will appear contradictory, the last in order shall prevail, unless a contrary intention be clearly shown in the context; *Morrall v. Sutton*, 1 Phill. C. C. 533, 537, 545. A general rule relied upon by the defendants is that the heir shall not be disinherited unless that intention be clearly expressed. But here the ultimate limitation to the testator's right heirs is in itself a plain intimation of intent that the estate should not go to them unless in a specified event. In one particular event the heir, if he could take, clearly, was not intended to hold. It will be argued, also, that, if the event on which the succession of the daughters is made to depend may be referred to a period subsequent to the death of the testator's daughter, and a remainder is to become vested at that period, to the exclusion of the heir at law, the will ought to show with certainty some person or class in whom the remainder is then to vest. But, on the terms of the will, there can be no doubt that, on the supposed failure of issue male, the daughters, if any were living at the mother's death, would take, and, if one or more were then dead and had left issue, the issue would take, in place of such daughter or daughters; if all the daughters were dead, their issue only would be the class to take. The contingency does not affect the limitations, but only the parties to be benefited. It cannot have been meant *that, on failure of the male issue subsequently to the death of Lady Eden, the heir at law should come in to the ex- [*271 clusion of the daughters and their issue, whose succession is provided for so circumstantially. Even in the case of Lady Eden's having no issue, male or female, the will contemplates an exclusion of the heir at law by her will or appointment. The residuary clause in favour of Lady Eden also furnishes an argument against the alleged intention. And (as was before observed), though the testator has made a final devise to right heirs, it is expressly subjected to all the prior limitations, and to the power of appointment.

On a comparison, therefore, of the clauses of the will, there sufficiently appears a class in which the remainder might be intended to vest, and will vest. A more difficult question arises on the introductory words of the proviso: If "my said daughter shall have no issue male of her body *living at her death*, or no such issue male as shall be entitled by the true meaning of this my will to my real estates hereby limited and settled," I devise, &c., to all the daughters, &c., of the body of my said daughter who shall be living at her death, &c. The Court of Exchequer has held, in *Wilson v. Eden*, 1 Exch. 772,† that

the words "living at her death" are to be understood in the second, as they are expressed in the first, branch of the sentence; and that the condition on which the daughters are to inherit is, that there shall not be any issue male living at the time of Lady Eden's death, who could inherit the real estates under the will: whereas Lady Eden's son, Sir Robert Johnson Eden, outlived her, and succeeded to the devised estates.

*272] But, on a strict *examination of the sentence, there will be found no reason for carrying on the words "living at her death" to the second branch of it. Distinct contingencies are contemplated, one including, the other not including, this incident. (The grammatical construction of the sentence is so amply discussed in the judgment of the Court, which agrees with the argument for the plaintiff, that a fuller report here is unnecessary. *Humphry* referred to the observations of Lord LANGDALE, M. R., on this subject in *Wilson v. Eden*, 11 Beav. 295, et seq., in the Rolls Court. And, as to the objection that one of the alternatives mentioned would be ineffective on the suggested construction, he cited 1 Jarman on Wills, 244, c. 9, s. 2,(a) *Longhead dem. Hopkins v. Phelps*, 2 W. Bl. 704.

Malins, contrâ.—It is not disputed that the will gave a remainder to the daughters; but it was contingent, and the contingency has happened so as to carry the estates to Sir W. Eden. As to the testator's intention, it is clear that he did not mean the daughters to take in the event of any failure of issue male: if he had had that purpose a very few words would have expressed it. The proviso must have meant more. A leading object in the will was to prevent a union of the Johnson and the Davison estates in the same hand; and, following out that design, the testator, when he declares that the daughters shall take if Lady Eden has no issue male of her body living at her decease, adds, as a contingency equivalent to that, if she shall have "no such issue male as shall be entitled" to the real estates according to the provision *273] which excludes an *inheritor of the Davison estates. In each provision he looks to the state of things at the time of Lady Eden's death: there is no ground, either in the circumstances or in the words and context, for supposing a distinction. According to the argument for the plaintiff on failure of issue male of Lady Eden, whenever that might happen, any daughters or even daughter of Lady Eden, or the heirs of such daughters or daughter, would take the estate in fee: whereas in the successive limitations to the sons there is no mention of daughters. It cannot be assumed that, as between the female descendants of sons and the female descendants of daughters, the testator intended such a preference. Another circumstance, which shows that his view in the proviso was limited to the state of things at Lady Eden's death, is the power given to her of making an appointment to take effect if she should have no issue living at that time. The intro-

(a) "But care should be taken," to "following cases"

duction of that power does not show an intention to exclude the heir at law. Had that been intended, the will would probably have made some reference to the daughters of Lady Eden's sons therein named, or of her son or sons who might yet be born. For want of this, the property might, in some events, have remained undisposed of, on the failure of male issue after Lady Eden's death. The supposed intention to exclude the right heir would not be effected by the residuary clause; for, before stat. 7 W. 4 & 1 Vict. c. 26, came into operation, such a clause would pass those estates only which were the testator's and undisposed of at the date of the will. And, when the testator makes a specific limitation of a partial or contingent interest, not exhausting the whole fee, and then leaves the reversion in fee, or the estate in fee on failure of the *contingency, to his right heirs, a residuary clause does not act upon such an interest; *Amesbury v. Brown*, 2 W. Bl. 739, (a) [*274] *Robinson v. Knight*, 2 Eden's C. C. 155.

Then, as to the particular words of the proviso in question. If the testator has pointed out a specific contingency in plain terms, these must have their effect, and cannot be departed from on a speculative view of his intentions. That principle was acted upon in *Denn dem. Radclyffe v. Bagshawe*, 6 T. R. 512, where the material words were, "if living at the time of her death," and *Shulldham v. Smith*, lessee of *Mathews*, 6 Dow, 22, which turned upon similar expressions. Other cases to the same effect (among which is *Doe dem. Vessey v. Wilkinson*, 2 T. R. 209) are cited in 1 *Jarman on Wills*, 744—752, c. 25, s. 3. *Doo v. Brabant*, 4 T. R. 706, and *Calthorpe v. Gough*, 4 T. R. 707, (b) are of the same class. Here the Court of Exchequer has decided that, in the first sentence of the proviso, the words "living at her death" apply to both branches; and that is the true construction. The sense is: "If, at the time of my daughter's death, there is no living issue male of my daughter then entitled to the estates, I devise them to those of her daughters who shall be living at her death." A contingent event and a contingent class are pointed out: and the whole proviso agrees with this view. On the plaintiff's construction, the second branch of the first sentence is nugatory. [*COLERIDGE, J.*—You make the first branch inoperative. *ERLE, J.*—Suppose there *were only one son living at the mother's death, and he were entitled to the *Davison* [*275] estates?] That would be the same as if there were none. [*ERLE, J.*—Then you make the second alternative include the first.] *Stert v. Platel*, 5 New Ca. 434, follows a rule which the defendant is seeking, not to impeach, but enforce; that a limitation shall take effect by vesting at the earliest possible time.

Humphry, in reply.—*Shulldham v. Smith*, lessee of *Mathews*, 6 Dow,

(a) Cited in *Smith dem. Davis v. Saunders*; S. C. 2 Eden's C. C. 160, cited in *Robinson v. Knight*.

(b) Note (b) to *Doo v. Brabant*.

22, and the other cases of that class which have been cited, were cases where the contingency, as understood by the Court, appeared in clear words. But, in the section of Jarman, where some of these are cited, it is said, vol. i. p. 748: "Still, however, where the construing of the devise to be contingent, in accordance with the letter of the will, would have the effect of rendering nugatory a purpose clearly expressed by the testator, the Courts will struggle to avoid such a construction." As to the effect of a residuary devise; the rule referred to on the other side does not affect the plaintiff's case. A residuary devise of real estate (prior to stat. 7 W. 4 & Vict. c. 26), is "in fact a specific disposition of the lands not before given, or, to speak more accurately, not before expressed to be given by the will": 1 Jarman on Wills, 587, 8, c. 20, s. 1. "Nor," as the author observes, "is this proposition at all shaken by the rule" "that a residuary disposition of real estate will carry all the contingent or reversionary interests which a specific devise may leave undisposed of." The question still is, in this case, *276] how far the heir can allege that any contingent or *reversionary interests are disposed of in his favour. *Robinson v. Knight*, 2 Eden's Ch. Ca. 155, bears no analogy to the present case. In Mr. Eden's note upon that decision, *ib.* p. 161, it is said: "The present case and *Amesbury v. Brown*, 2 W. Bl. 739, were cited and approved of by DE GREY, C. J., in *Smith dem. Davis v. Saunders*, 2 W. Bl. 736, 739, where it was laid down, that a residuary clause would extend to every latent reversion which the testator might have in him, unless it were expressly excluded by devise to some other person; that in case such latter devise be to the testator's own right heirs, although they cannot take as purchasers, yet as the whole is merely a question of intention, it will equally operate as an exclusion of the residuary devise:" and the Editor cites further authorities on the point.

As to the proviso itself: the two parts of the first sentence must be read as distinct provisions. If Lady Eden had any issue male at the time of her death, it must have been issue male "entitled," contingently at least, to the testator's real estates. For, by the will of Morton Davison, if any son of his nephew Sir John Eden succeeded to the Baronetcy, his whole right in the Davison estates was to cease from thenceforth; but, by the will of Peter Johnson, the party so disabled from continuing to hold the Davison estates would become qualified to hold the estates of Johnson. And, if the two parts of the sentence referred to have different meanings, they must be, that the limitation to daughters shall take effect, first, if Lady Eden should have no issue male at all living at her death, and, secondly, if she shall not have issue *277] male who then or at any subsequent time shall be entitled to the Johnson estates. *This point was not taken before the Master of the Rolls, or in the Court of Exchequer. [ERLE, J.—Does the baronetcy follow the same course of descent in the Johnson family as

the Johnson estates?'] It does. [ERLE, J.—Johnson cannot have read the will of Davison with attention; for it seems to be an impossible supposition that the Johnson estates should come to a person having the Davison estates. COLERIDGE, J.—They would come to such a person *de facto* entitled; but he would immediately lose them.]

Cur. adv. vult.

COLERIDGE, J., in the vacation following this term (December 18th), delivered the judgment of the Court.

This was a case sent for the opinion of this court by Lord LANGDALE, and was elaborately argued on two days before my brothers WIGHTMAN and ERLE and myself. The question to be determined by it depends on the construction of a single proviso in the will of Peter Johnson, which we shall state presently in terms; but it is necessary first to set out the substance of the previous limitations.

By these he devised the estates now in question to the use of his wife and his daughter Lady Eden successively for their respective lives, and after their deaths to his grandson Robert Eden, eldest son of his said daughter, for his life, and after his decease to the first and other sons of his said grandson, severally and successively, and the heirs of their respective bodies, and, for default of such issue, to his grandson Morton John Eden, second son of his said daughter, for his life, in case he should not become or not continue seised of the real estates of Morton Davison by virtue of his *(Davison's) will. And, after the decease of Morton John Eden, the testator devised his said estates, [*278 upon the conditions aforesaid, to the first and other sons of the said Morton John Eden severally and successively, and to the heirs of their respective bodies, and, in default of such issue, he devised the said estates, upon the like condition as aforesaid, to the third and every other son of his said daughter to be begotten, severally and successively, and the heirs of their respective bodies. And the testator declared that, if the said Morton John Eden or any son of his said daughter should at any time during his life become seised of the real estates, devised by the said Morton Davison, then the said Morton John Eden, or such son of his said daughter so becoming entitled, or any heir of his body, should not take any interest in any of his, the said testator's estates, but the same should go over to, and be enjoyed by, the next son of his said daughter and the heirs of his body; with a clause, however, for revesting the estates in the son so displaced on certain contingencies therein specified. And then comes the proviso on which the question for our decision turns: "Provided always," &c. His Lordship here read the proviso set out at p. 261, *antè*, ending with the devise to testator's right heirs in default of appointment by Lady Eden and subject, &c.

It is obvious that the testator framed his will with reference to the provisions in the will of Morton Davison. That will is made a part of

the present case; and it may be convenient to have before us the two clauses of it which are material to our present consideration. It appears that Sir John Eden, Bart., who had married Miss Johnson, was the nephew of Morton Davison; and the two wills show a concurrent *279] desire *of both testators to prevent the union of their two estates in the same son of Sir John and Lady Eden. Morton Davison made his will in 1769; Peter Johnson his in 1779.

The former, after a life estate to Sir John Eden, devises thus: "And from and after his decease, then, in case my said nephew Sir John Eden shall have more sons than one of his body lawfully begotten, then unto and to the use of the second son of my said nephew Sir John Eden lawfully to be begotten, and of the heirs male of the body of such second son lawfully issuing: And, for default of such issue, to the use of the third, fourth, and all and every other the son and sons of the body of my said nephew Sir John Eden lawfully to be begotten, except his eldest son, severally, successively, and in remainder one after another as they and every of them shall be in priority of birth, and of the several and respective heirs male of the body and bodies of all and every such third, fourth, and other son and sons, except his eldest son, lawfully issuing; the elder of such sons and the heirs male of his body being always preferred and to take before the younger of the same sons and the heirs male of his and their body and bodies issuing." Then follow a long series of limitations, concluding with an ultimate devise to his own right heirs for ever. Then follows a gift of tithes, immaterial to our present consideration; and then comes this proviso: "Provided nevertheless:" His Lordship here read the proviso set out at p. 267, antè, for cesser and devolution of the estate in case the baronetcy should come to the second, third, or other younger son of Sir John Eden, or to any other person taking under the will.

*280] *Putting, then, the two wills together, it is obvious that the being entitled to hold one of the properties under the former was to be an exclusion from the other under the latter, and so conversely; and further, that, if at any period there was but one son of Lady Eden living after the decease of Sir John Eden, as he must be the baronet, he would on the one hand be excluded from the Davison property, and on the other, in the words of the proviso in question in the Johnson will, would be "entitled by the true meaning of that will" to the real estates thereby limited and settled. As then, at any given period, to have no issue male of Lady Eden's body was necessarily to have no such issue male as should be entitled to take the estates, so also to have at the same given period no such issue male as should be entitled to take was the same as to have no issue male at all.

Coming now to the material part of the Johnson will, we think it was rightly contended on the part of the plaintiff that the proviso in question was in substance only a link in the chain of limitations by

which the disposition of these estates was carefully provided for after the determination of the life estates to the testator's widow and daughter respectively. This chain commences by giving life estates to the only two then born sons, with remainders in tail male to their issue successively, and estates in tail general to unborn sons successively; and, as this would have been a very incomplete provision had it stopped there, and as the daughters of Lady Eden were clearly the next objects in the testator's mind, the will might have been expected to proceed in the ordinary form, providing, in default of such issue as before enumerated, for the *daughters, substantially as they are now in effect [*281 provided for. Had that been done there could have been no doubt upon the construction; why it was not done seems sufficiently accounted for by the interposition of the proviso disabling and re-enabling to take the estates in case of the Davison property coming to or passing from any younger son of Lady Eden. This interposition might have seemed to the framer of the will to render the common form of reference improper. •

This brings us to the proviso in question. Now, when it was penned, Lady Eden had two sons living, and more might be born; the event, therefore, on which the daughters were intended to take, would not unnaturally present itself to the testator's mind with reference to the two contingencies: either both or all might die without issue in her lifetime, or, they or some of them surviving her, there might be still a failure of issue male entitled to take at some later period. It is clear that he did contemplate the failure in regard to two contingencies at least; for he uses the unequivocal words "then and in either of those cases;" and, those words being used with reference to what he had expressed immediately before, if the previous expressions, as they stand without the least alteration, addition, or transposition, will in their ordinary meaning adequately describe two contingent events, and such ordinary meaning is not repugnant to any intention of the testator before expressed, upon every sound rule of construction that ordinary meaning ought to prevail. We are therefore to examine the language itself: and, in so doing, as the same examination has already been made in the Court of Exchequer, and we have been led to an opposite conclusion from that to which that *Court arrived, it is scarcely [*282 possible to avoid commenting upon the reasonings and observations on which it is built; for they are in truth the substance of the argument on which the case for the defendant must rest.

The words are: "Provided always, that, if it shall happen that my said daughter shall have no issue male of her body living at her death, or no such issue male as shall be entitled by the true meaning of this my will to my real estates hereby limited and settled as aforesaid." It is said that there is no verb to the second member of the sentence; that one must be imported into it; and that the only question is what

that verb shall be. We think this is a mistake. Where that which follows a transitive verb is made up of parts, either united by a conjunctive or divided by a disjunctive particle, the force of the verb equally in either case *passes into* both parts, making up the whole as if the whole had been unbroken. There is no need in either case of any mental repetition of the verb. In the Latin language, the verb would have come last in the sentence, and then it would have been clear, as in that case the mind of the reader or hearer would have been in suspense as to what the verb would ultimately be until all had been expressed on which the verb was to operate, and *could* not have applied the verb to the first branch before the second was expressed: so, in the English, the force of the verb itself remains as it were suspended in his mind until the whole is expressed on which it is to operate. If that which is governed by "shall have" could in each branch be expressed by a single accusative case, what we maintain might be clearer; but, framed as the sentence is at present, the principle is the same, that *283] there is no mental repetition of the verb in the second branch, and therefore no necessity for any written importation of it to make the language strictly accurate in grammar. We would gladly have avoided this grammatical minuteness; but, at whatever hazard, the examination must be gone into, if the construction of the sentence is to depend on it. If we are right, the whole sentence has an adequate meaning without the alteration or addition of a letter; and that meaning gives us two contingencies; for the same contingency, limited to determine at two different periods, is in fact thereby made two. And, as so to read the will is quite consistent with the testator's intention, it is no argument against it, that, had he been more clear-sighted, he might have expressed his intention in a single branch of the sentence: he has clearly contemplated the providing for two cases: the contingency on which he meant the daughters to take so presented itself to his mind; and he has framed his language accordingly.

But, if it be necessary to import a verb into the second branch to make the grammar complete, we cannot agree in the argument for the defendant as to what is to be imported. We take it that the only safe rule can be to import so much as is necessary to make the grammar complete, and no more. The course for the defendant has been to transpose the words "living at her death" in the first clause, to which there is no objection there, because there it makes no difference in the meaning; and then to introduce the verb with those words, so transposed, annexed to it and made to form a part of it, into the second, whereby a new sense is given to that part: taken as a whole, therefore, *284] the sense of the sentence is altered by the transposition, which seems to us a fatal objection to it, it not being necessary to effectuate any clearly expressed intention of the testator. If the transposition would have altered the meaning of the first clause, it

clearly could not have been made; why then should it be allowed when it alters the meaning of the second? If, indeed, the defendant is right in contending that "living at her death" is part of the verb which governs the sentence, we admit that this argument fails: it is not then properly a transposition, but rather a bringing together the divided parts of the idea which the verb represents; and that verb will certainly govern both members of the sentence: this would follow from our own argument. But "living at her death" is a qualification of the "issue male;" it shows what sort of issue male the testator had in his mind; and, wherever placed, it is no more a part of the verb than the issue male itself. It is not a part of the verb governing, but of that which is governed by it. What is proposed to be done, therefore, remains a transposition, and no more; and, if unnecessary, it is not allowable, because it works an alteration of the sense. It is to be observed, moreover, that the words "living at her death," in the place in which the testator has placed them, are not only neither senseless nor contradictory (which are the true grounds on which transposition is allowable), but they stand just where any ordinary or even accurate writer would have placed them, who desired to convey the idea which the first member of the sentence was clearly intended to convey: to move them as the defendant desires to do, only makes that clause awkward and unusual in phraseology.

*But considerations are suggested, why the transpositions should be made; and with these it is incumbent on us to deal. [*285 In the first place it is said that, unless the construction be adopted, "the first member of the proviso is wholly nugatory and inoperative." (a) To this it might be enough to answer, that, if it *be* adopted, the same consequence immediately follows. "If my daughter shall have *living at her death* no such issue male as shall be entitled, &c.," she can have no issue male of her body living at her death. For, if but one only son were then living, nothing would disentitle him from taking, but the possession of the Davison estates: but, as Sir John Eden, the father, took a life estate in these under the Davison will, such son, though not disqualified by being the Baronet, yet could not take them during the father's life, and, upon the death of his father, he would be disqualified by the descent of the baronetcy. But this is not the only answer. As the words now stand, coupled with the provision which follows for the granddaughters, the substance is this: "if there shall be a total failure of issue male at the time of my daughter's death, or an indefinite failure of such issue male at any time, living any granddaughter who survived my daughter, or the issue of such daughter predeceased, then over." These are surely two contingencies: and, although the happening of the first may involve the second, yet, the first *not* happening, the second may; and then the remainder to the daughters would take

effect. If the testator had said: "if either at my daughter's death, or at some later period named, there should be a failure of issue male, *286] the estate shall go over to my *granddaughters," no doubt the language would have been redundant; but it would be a redundancy so ordinary in the language of ordinary men that it would not have furnished an adequate ground for a transposition of words such as is here insisted on.

But it is further said that, as the power of appointment given to Lady Eden was to be exercised by way of substitution for the gift to the daughters or their issue, it must be taken to have reference to the happening of the same events, there being no daughter, as would have entitled the daughters to take if there had been any. And, as it is clear that the power of appointment could only arise on the failure of issue male and female both *living* Lady Eden, so it is reasonably to be inferred that, whether daughters should take or not, must be determined before her death. Much stress is not laid on this argument in the judgment of the Court of Exchequer: and it is to be considered that this was a power clearly capable of being exercised contingently before the event arose on the happening of which only the exercise could take effect. Up to the last hour of Lady Eden's life, sons or daughters, living till then, might die; and she might be unable to exercise the power at all, although the event had arisen on which it was given to her, unless during their life she had contingently exercised it. It is therefore in truth no more than a cautious provision by the testator to interpose one more let in the way of the estates coming under the ultimate remainder to the heir at law.

The result of our examination is, therefore, that both branches of the proviso have a clear meaning as they stand in terms; that it is unnecessary, and therefore improper, to make any the slightest alteration in *287] their language; but that, if it should be thought that a verb must be introduced into the second branch, that introduction must be confined to the words "shall have," and that, neither as part of the verb nor by way of transposition, ought the words "living at her death" to be so introduced.

We conclude that the event has happened under which the gift over to the daughters arises. And although we cannot come to this conclusion without that degree of doubt as to its correctness which the contrary opinion of the Court of Exchequer must create in our minds, yet, entertaining it as we do after careful investigation, we shall certify to that effect to the Master of the Rolls.

A certificate was sent accordingly. (a)

(a) Lord LANGDALE, M. R., decided in conformity to the above certificate, on March 6th, 1850: *Wilson v. Eden*, 12 Beav. 454. But the House of Lords, on appeal, December 14th, 1852, reversed the decree of Lord LANGDALE, with a declaration that the daughters took no estate under Johnson's will: *Eden v. Wilson*, 4 H. Lords' Cases (not yet published).

THE QUEEN v. THE INHABITANTS OF WIGAN. Nov. 17.

The clerk to the Guardians of W. Union, comprising, among other places, the township of Wigan, wrote to the Guardians of L. Union, stating that he was directed to request them to relieve, on account of the W. Union, certain paupers resident in the Union of L. and chargeable there. The clerk added a schedule, stating, among other particulars, that the paupers were settled in Wigan. The L. Union thereupon advanced money to the paupers, and the sum was repaid to them by the clerk of W. Union.

Held, on appeal against an order of removal to Wigan, that these facts were *prima facie* evidence of an acknowledgment by Wigan that the paupers were settled there, without proof of a written order by the W. Guardians, and without further evidence of the circumstances under which the clerk was directed to write.

On appeal against an order of justices for removing Mary Bamber and her children from the township of Leyland to the township of Wigan, both in the county of Lancaster, the Sessions confirmed the order, subject to the opinion of this Court upon a special case.

*The case incorporated the examinations, order of removal, [*288 and notice and statement of grounds of appeal.

The examination of the pauper, Mary Bamber, was as follows: "I am about 34 years of age. I have never been married. I am the illegitimate child of Jane Bamber. I was born in Wigan, as I have always been told and believe, where my mother's settlement was. I was living in Leyland in this county in or about the month of January, in the year 1846. I have two illegitimate children" (stating names and ages). "In or about the month of January, in the year 1846, having become chargeable to Leyland, in the county of Lancaster, I was sent to the township of Wigan, in the county of Lancaster, to which township I belonged, to apply for relief there. I went to Wigan aforesaid with my youngest child, and saw Mr. Robert Halliwell, the relieving officer of Wigan aforesaid. I told him I belonged to Wigan, and applied to be taken into the workhouse. He knew me, as I had received relief from the said township of Wigan before; and he sent me and my said youngest child into the Wigan workhouse, where I remained 23 weeks. I am now receiving relief from the said township of Leyland; which relief is made necessary," &c. (The rest is not material.)

The examination of Thomas Jones, attorney at law, partner of Mr. Stanton, Clerk to the Board of Guardians of the Chorley Union, in the county of Lancaster, stated the receipt, at Messrs. Jones and Stanton's office, of a letter signed "Thomas Bullock, for Clerk to the Wigan Union;" and added "Many letters on the business of the Wigan Union, signed 'Thomas Bullock, for the Clerk to the Wigan Union,' and appearing to be in the same handwriting as the signature to the *said letter marked B, have been received by the Clerk to the [*289 Board of Guardians of the Chorley Union, in reply to letters addressed to the Clerk to the Wigan Union; and I believe the said letter, marked B, to be signed by Thomas Bullock, Clerk to Mr. William Ackerly, who is Clerk to the Guardians of the Wigan Union."

The deponent further stated that he received 19s. 6d., the amount authorized to be paid to Mary Bamber by the said letter, about the 7th of November, 1847, from the Clerk to the Guardians of the Wigan Union, on account of the said township of Leyland.

The letter marked B was as follows:

“To the Guardians of the Poor of the Chorley Union.

“Wigan, 5th day of March, 1847.

“Gentlemen, I am directed to request that you will, through your relieving officer, relieve, on account of this Union, the undermentioned pauper, residing at Leyland in your Union, with the relief and for the period stated below. I am,” &c.

“Thomas Bullock; for Clerk to Wigan Union.”

| Pauper's Family. | Age. | Occupation. | Where settled. | Relief to be given. | For what Period. |
|-----------------------------|------|-------------|----------------|---------------------|------------------|
| Mary Bamber and child. } | 34. | Weaver. | Wigan. | 1s. 6d. weekly. | 3 months. |

The examination of Thomas Gaskell was as follows. “I am one of the relieving officers of the Chorley Union in the county of Lancaster, for that district in which the said township of Leyland is situate. I received the said letter, marked B, from the Clerk to the Chorley Board *290] of Guardians, and I paid the sum of *19s. 6d., as such relieving officer, to the said Mary Bamber, now present, whilst she was residing in Leyland aforesaid, in obedience to the said order or letter, marked B, on account of the said township of Wigan.” The examination went on to verify a certificate of chargeability to Leyland, granted by the Guardians of the Chorley Union under their common seal.

The ground of appeal was: “That the examinations upon which the said order is founded are, and each and every of them is, informal, defective, and bad on the face thereof, and insufficient in law to justify the making of the said order.”

The case stated that the appeal came on for hearing at the Preston Quarter Sessions, on 5th April, 1848, when on the part of the appellants it was objected that the examinations were bad and insufficient in law: “First, because they contain no legal evidence of a settlement of the paupers in the appellant township: and secondly, because they contain no direct or legal evidence showing that the appellants had acknowledged a liability by granting relief to the pauper, as pretended in the examinations.” The Sessions overruled the objections, held the examinations sufficient, and confirmed the order, subject to the opinion of this Court on the sufficiency of the examinations. If this Court should be of opinion that the examinations were sufficient, the orders

of justices and of sessions were to be confirmed; otherwise to be set aside.

Pashley, in support of the order of Sessions.—It must be admitted that the pauper's examination furnishes no legal evidence as to birth. As to acknowledgment, the relief in 1846 is some evidence against Wigan. Relief to *a pauper, being in the parish, is inconclusive; [*291 but, under the circumstances here stated, it may, in the nature of an admission, have some effect; *Regina v. Sow*, 4 Q. B. 98 (E. C. L. R. vol. 45). The main question, however, is, whether the Clerk to the Board of Guardians of a Union is competent to admit a settlement in a parish within such Union, the question being between that and another Union. The admission here is by a kind of communication which parochial bodies are in the habit of making to each other, and which is of daily mutual convenience, and not of such a nature as to require the common seal. The act of the Clerk in making it may fairly be deemed the act of the Guardians. The term "Clerk" in itself imports that he is an officer employed to keep their minutes and to write such documents as do not require the common seal. This is shown by the explanations of the word "Clerk" in Cowel's Interpreter and Tomlins's Law Dictionary, and "Clerici" in Ducange, where it is said (vol. 2, p. 394, ed. Paris, 1842) that "Clerici" are "Scribæ, actuarii, et amanuenses judicum, vel officialium regiorum, aut qui sumptus quotidianos ad officia ac munera spectantes, in acta referunt, aliaque obeunt munia, quæ sine qualicunque doctrinâ præstari nequeunt." [ERLE, J.—Does any statute define the duties of the Clerk to Guardians?] *Pashley* referred to stat. 4 & 5 W. 4, c. 76, s. 46, but admitted that no specification of the Clerk's duties appeared to have been made by the Commissioners under that clause: also to stat. 5 & 6 Vict. c. 57, s. 17, and stat. 7 & 8 Vict. c. 101, ss. 5, 12, 15, 68, 69.

As to the authorities: it was indeed held in *Regina v. Bradford*, 8 Q. B. 571 (E. C. L. R. vol. 55), (a) that a statement, by the [*292 relieving officer of a Union, that he had relieved paupers on account of a particular township in it, did not prove chargeability to that township. It was assumed, on the statement of the officer, that he could not know, unless from some written document, whether the relief was on behalf of one township of the Union or another. But it is not clear that he might not have known by a verbal order. And in *Regina v. Hartpury*, 8 Q. B. 566 (E. C. L. R. vol. 55), decided a year later, the Court adopted a less rigid construction of facts. *Regina v. Little Marlow*, 10 Q. B. 223 (E. C. L. R. vol. 59), decided nothing in favour of the appellants. That was a case simply of relief given by the relieving officer of a Union; there was no evidence that the relief was in fact given on behalf of the parish, or that the parish were cognisant of it. But in *Regina v. Crondall*, 10 Q. B. 812 (E. C. L. R. vol. 59), the Court drew

(a) Note (A) to *Regina v. Hartpury*.

a distinction between the act of the Guardians and the mere act of an officer, saying: "Where an application for such relief has been made to the relieving officer of a Union, whose duty it is to examine into the merits of the case, and to report thereon to the Board of Guardians, and when he has brought the application before that board, whose duty it is to inquire into the settlement, and to order such relief only in case of being satisfied that the settlement is in one of the parishes of the Union, and relief has been ordered by that board on account of one of the parishes, and given by the relieving officer according to such order, all the steps now required by the law have been taken, and such relief is legally given." And the Court thought that the authority of the *293] parish *might be inferred from the act of the Guardians, as the parish would have a representative at the Board, and the Board was at all events bound to take care of the interests of the parish. Any authorized act of relief, to a pauper not in the parish, would be some evidence of settlement; *Rex v. Edwinstowe*, 8 B. & C. 671 (E. C. L. R. vol. 15).

Whigham, contra.—The allegation of birth-settlement is futile. The other statements in the examinations are only corroborative of that, and all depend, for their efficacy, on the letter of March 5th. The clerk there merely says, "I am directed to request that you will" "relieve, on account of this union." It does not appear who gives the direction. If the Guardians gave it, that would appear by the books, properly signed and counter-signed, and showing the particulars. That evidence was given in *Regina v. Crondall*, 10 Q. B. 812 (E. C. L. R. vol. 59). (a) The present case, therefore, is not brought within that decision, even assuming the letter to be authorized by the Board; and, in principle, it is the same as *Regina v. Little Marlow*, 10 Q. B. 223 (E. C. L. R. vol. 59), and *Regina v. Bradford*, 8 Q. B. 571, note (h), (E. C. L. R. vol. 55). In the first of these two cases, Lord DENMAN, C. J., said: "We cannot, therefore, take notice of any charge on the one parish, or the other, which the relieving officer might have made in his books; for they were not produced; nor is there any statement, if they had been, of their ever having been shown to or brought within the cognisance of the overseers of Wooburn parish." (b) [WIGHTMAN, J.—Sup-

(a) See also *Regina v. Pott Shrigley*, 12 Q. B. 143 (E. C. L. R. vol. 64).

(b) *Whigham* also referred to *Regina v. Shitlington*, Q. B. Mich. T. (November 19th) 1845, where, to prove chargeability, the relieving officer of the parish of Whitley Upper in the Huddersfield Union (the complaining parish) stated at the sessions that he had, as such officer, given 2s. a week to the pauper "by order of the Board of Guardians;" "that such order was in writing;" and that such orders were entered in a book called the Order book. Neither the book nor any written evidence of the order was produced, nor was there any further proof of its terms. It was objected that, the order being proved to be in writing, it ought to be produced; and that, without the production, it did not even appear that the Guardians had ordered the relief to be given out of the funds of Whitley Upper. The Sessions received the evidence, subject to the opinion of this Court on a case, and confirmed the order of removal. The Court (Lord DENMAN, C. J., WILLIAMS and WIGHTMAN, Js.) stopped the argument (after having heard *R. Hall* and *Pickering* in support of the order of sessions, and *Pashley*, with whom was *Overend*, contra): Lord DENMAN, C. J., merely observing that, without the book, the Court had nothing to refer to. *Whigham* cited the case from 1 New Magistrates' Cases 432.

pose *it had appeared that this letter was written with the express authority of the Guardians.] It would still not be sufficient, [*294 without some proof of the steps of inquiry pointed out in the judgment of the Court in *Regina v. Crondall*. The only specific acknowledgment in the letter is by the words "Where settled. Wigan:" but those do not show that "Wigan" is the same with the township of Wigan, to which the present removal is made; nor does it appear that the Clerk had any knowledge on the subject.

COLERIDGE, J.—I am of opinion that the rule for quashing this order must be discharged. The whole question is of agency. It cannot be denied that, if the Guardians of a Union, proceeding in a regular course, order relief to be given to a pauper on behalf of a particular parish in the Union, and it is given, those facts together are evidence against the parish. But it is urged here: First, that there is no evidence of the *justices having given such an order: and, Secondly, that the [*295 steps are not shown to have been regular. Now the letter from the Clerk to the Guardians of the Wigan Union asks relief for a pauper, not resident in their Union, from the Guardians of the Chorley Union: and there is appended to that letter a schedule with the words "Where settled. Wigan." It is argued that this is an expression to which we cannot attach much importance; but, if it is once established that the letter is an admission, it must be taken most strongly against the party making it. And the letter desires relief on account of the Wigan Union, and fixes on a parish within it: the Chorley Union does in fact pay the money; and the Wigan Union repays it. But it is contended that, admitting the Clerk to be the agent of the Wigan Guardians, there is no proof that, in the present instance, his act was theirs, because their books are not produced to show an order duly countersigned. Supposing, however, that the proceeding was not taken regularly, but that the Guardians, at a meeting, gave the direction, and the Chairman neglected to sign and have it countersigned, it would be strong to say that the letter written under such an order was no evidence in this case. And, if the order was given, we must, on principle, assume that a guardian representing the township of Wigan was there, because it was his duty. Therefore the regularity of the proceeding is shown sufficiently, if the Clerk was agent to the Guardians. It has been observed that we have no order of Commissioners before us, under stat. 4 & 5 W. 4, c. 76, s. 46. But the statutes which have been referred to justify us in treating the Clerk as a recognised officer of a Union. And certain duties *attach to officers of a certain name [*296 ex vi termini. One of the duties of a clerk to Guardians, which we may thus infer, is the making communications to other Boards. He would naturally be the channel for these, and for making arrangements as to the sending of small sums of money. And in this case I think the nature and subject of the communication are alone sufficient to raise

the inference of agency. We have, therefore, the Guardians of a Union, of which Wigan is one member, sending relief to a pauper as belonging to Wigan, while resident in the Chorley Union.

WIGHTMAN, J.—It could not be contended, since the case of *Regina v. Crondall*, that this letter, if it had proceeded directly from the Board of Guardians, would not have been sufficient. Then the question is, whether enough was shown here to raise the presumption that the letter had their authority. It was written, in fact, by a person named Bullock, but must be treated as written by the Clerk himself; the only question is, whether he was authorized. I think he was so authorized, as an officer recognised by the statutes, and appointed with certain duties, among which is that of carrying on the correspondence of the Guardians with the persons who are presumptively parties to a transaction of this kind. The letter, therefore, was *primâ facie* evidence.

ERLE, J.—The question is, not whether a distinct settlement was shown, but whether there was proof of an admission. The Guardians *297] are the authorized *agents of all the parishes and townships to decide whether relief shall be given or not. If they decide that it shall, and it is given accordingly, *Regina v. Crondall* shows that this is evidence against a township on behalf of which the relief is professedly given. Here is not only an admission of that kind, but an actual repayment by the Union to those who have advanced the money. It must be presumed, *primâ facie*, that the Clerk was their agent in writing the letter, though it was not written by his hand, but by that of a person habitually employed by him for the purpose. There was, therefore, some evidence of an admission by the township of Wigan.

Order of Sessions confirmed.

*298] **[It has been thought convenient that the six following cases, all relating to orders respecting lunatics, should be placed together.]*

The QUEEN v. The CHURCHWARDENS and Overseers of the Poor of HATFIELD PEVEREL. [July 5.]

When a pauper lunatic has been removed to an asylum by an order under stat. 8 & 9 Vict. c. 100, s. 48, justices may adjudicate upon the settlement, under stat. 8 & 9 Vict. c. 126, s. 58, and an order may be made upon the parish of the settlement, under stat. 8 & 9 Vict. c. 126, s. 62, for payment of expenses.

Such order of removal cannot be brought up by certiorari.

If it be so brought up, the objection to the certiorari may be taken on the return.

It is no valid objection, that the order for payment of expenses sets forth the order of removal, and the adjudication of the settlement, by way of recital, without finding that the statements in such order and adjudication are true.

The order may be for payment of a sum specified as reasonable at the time of the order, "or such other weekly sum as the proprietor of the said house shall hereafter, and from time to time, reasonably charge."

The order for payment being brought up by certiorari, it is no valid objection, that the order of removal appears by affidavit to have been given by a clergyman who was not the officiating clergyman of the parish from which the removal was made.

Nor that it does not appear by the order of adjudication that, before adjudication, any notice was given to the parish in which it is adjudged that the pauper is settled.

Nor that the order for payment recites an adjudication that the parish "was the place of the last legal settlement" of the lunatic, without further stating the time of the settlement.

Nor that such order does not state the pauper to have been chargeable to the parish from which he was removed.

Nor that the removal is to a private licensed asylum, but it does not appear that there is no county asylum or that such asylum is full.

PASHLEY, in Hilary term 1848, obtained a rule calling upon the prosecutors to show cause why the after-mentioned orders of December 1st, 1846, and May 10th, 1847, brought into this Court by certiorari, should not be quashed for the insufficiency thereof; on notice to the Rev. William Buswell and Jeremiah Suckling, and to Samuel James Skinner and Edmund Round, Esquires, the persons (respectively) by whom the orders were signed, and to the churchwardens and overseers of the parish of Little Baddow in Essex.

The first-mentioned order was as follows.

"8 & 9 Victoria, c. 100.

Schedule (D) sect. 48.

By the officiating clergyman and relieving officer or overseer.

We, the undersigned, having called to our assistance Mr. John Thomas Gilson, a surgeon, not being the medical officer of the parish or union *to which the said" (sic) "Sarah Sampson belongs, and having personally examined Sarah [299 Sampson, a pauper, and being satisfied the said S. S. is a lunatic, and a proper person to be confined, hereby direct you to receive the said S. S. as a patient into your house. Subjoined is a statement respecting the said S. S.

W. BUSWELL, Chaplain to the Chelmsford Union House, officiating clergyman of the parish.

JEREMIAH SUCKLING, Overseer of Little Baddow."

Then followed a statement under the heads given in the above-mentioned schedule, specifying that S. S. was of the age of 31 years, single, a servant, had been insane 12 days, &c. The order concluded:

"I certify that, to the best of my knowledge, the above particulars are correctly stated.

"JEREMIAH SUCKLING. Dated the 1st day of December, 1846."

"To Mr. Edward Byas, proprietor of Grove Hall, Bow, Middlesex."

A medical certificate was added, certifying, in the form given by the schedule, that Sarah Sampson was a lunatic and a proper person to be confined.

The first order of May 10th, 1847, was as follows.

"Essex (to wit). Whereas heretofore, to wit, on the 1st day of December, 1846, by a certain order of the Revd., &c., "an officiating clergyman," &c., "and Jeremiah

Suckling, overseer," &c., "bearing date," &c., "directed to Mr. E. Byas, the proprietor of a house duly licensed for the reception of lunatics, called," &c., "reciting," &c., "they therefore thereby directed," &c. (stating the order above set forth): "and whereas a statement respecting the said Sarah Sampson was duly made and certified by the said Jeremiah Suckling, such overseer as aforesaid. And whereas a medical certificate respecting the said S. S. was duly made by the said J. T. Gilson, such surgeon as aforesaid. And whereas, in pursuance of the said order, the said S. S. was therefore afterwards, on the 2d day of December in the year aforesaid, conveyed to the said house of the said E. Byas, who then accepted and received the said S. S. into his said house. And whereas the said S. S. hath ever since been, and still is, *300] kept and confined as a lunatic in the said house. And whereas *we, Samuel James Skinner and Edmund Round, Esquires, whose names are hereunto subscribed and seals affixed, being two of Her Majesty's justices of the peace in and for the county of Essex, wherein the said parish of Little Baddow, from which the said S. S. was sent to the said house, is situate, having now, in pursuance of the statute in such case made and provided, and on the complaint and application of the churchwardens and overseers of the said parish of Little Baddow, inquired into the last legal settlement of the said S. S., and it now being satisfactorily proved before us, as well by the oaths of William Sampson, Charles Worraker, Caroline Hone, Jeremiah Suckling, and Edward Byas as otherwise, that the parish of Hatfield Peverel, in the said county of Essex, is the place of the last legal settlement of the said S. S.: We, the said S. J. Skinner and E. Round, such justices as aforesaid, do hereby adjudge that the said parish of Hatfield Peverel is the place of the last legal settlement of the said S. S. Given under our hands and seals, at Chelmsford, in the said county of Essex, the 10th day of May, 1847.

"SAM. J. SKINNER, (L. s.)

"EDMUND ROUND, (L. s.)."

The second order of May 10th, 1847, was as follows.

"Essex (to wit). To the churchwardens and overseers of the poor of the parish of Hatfield Peverel," "in Essex, and to the treasurer of the guardians of the poor of the Witham Union, in the said county of Essex.

"Whereas heretofore, to wit, on the 1st day of December, A. D. 1846, by a certain order of the Revd., " &c. (reciting the order of December 1st, the statement certified by Suckling, the medical certificate, and the subsequent proceedings, as was done in the previous order of May 10th, down to the words "confined as a lunatic in the said house"): "And whereas by a certain other order of us, S. J. Skinner and E. Round, Esquires, whose names are thereunto subscribed and seals affixed, being two," &c., "in and for," &c., "wherein," &c. (as in the last preceding order), "bearing even date with this order, but made and signed previously to the making and signing hereof, after reciting the first-mentioned order, and reciting that we, the said S. J. Skinner and E. Round, had, in pursuance of the statute in such case," &c., "and on the complaint," &c., "inquired into the last legal settlement of the said S. S., and it having been satisfactorily proved before us, as well by the oaths of William Sampson," &c., "as otherwise, that the parish of Hatfield Peverel in the said county of Essex was the place of the last legal settlement of the said S. S., we the said S. J. Skinner and E. Round, such justices as aforesaid, did thereby adjudge that the said parish of Hatfield Peverel was the place of the last legal settlement of the said S. Sampson: And whereas the said parish of Hatfield Peverel is one of the parishes *301] included and comprised in the Witham *Union as aforesaid: And whereas the said parish of Hatfield Peverel is a parish different from the parish from which the said Sarah Sampson was sent to such house as aforesaid: And whereas complaint has been made unto us," the said S. J. Skinner and E. Round, whose names," &c., "being two," &c., "wherein," &c. (as above), "by the churchwardens

and overseers of the said parish of Little Baddow, that she the said S. Sampson has become and now is actually chargeable to the said parish of Little Baddow, and that she is now receiving relief therefrom, and that they on behalf of the said parish have incurred great expense in and about the examination of the said S. S., and in and about her conveyance to the said house, and that they have paid divers sums of money to the proprietor of the said house for the lodging, maintenance, clothing, medicine, and care of the said S. S., where she hath ever since been kept and confined at the charge and expense of the said parish of Little Baddow, and the said churchwardens and overseers of," &c., "therefore having now made application unto us the said justices for an order upon the treasurer of the guardians of the poor of the said Witham Union, in which the said parish of Hatfield Peverel is comprised as aforesaid, for payment to the said churchwardens and overseers of," &c., "of the amount of the said expenses, and of the moneys so paid by them to the proprietor of the said house as aforesaid; and it being now satisfactorily proved unto us, the said justices, upon oath, that the said churchwardens and overseers of," &c., "have heretofore and within twelve calendar months before the making of this order paid the following sums in respect of the said pauper lunatic S. S. (that is to say): the sum of 4*l.* 0*s.* 1*d.*, being the reasonable expenses incurred by the said parish of Little Baddow in and about the examination of the said S. S., and the conveying of her to the said house, and also the further sum of 12*l.* 11*s.* 11*d.*, being the amount of the several sums which by the said churchwardens and overseers of the said parish of Little Baddow have been hitherto paid to the proprietor of the said house for the reasonable charges of the lodging, clothing, medicine, maintenance, and care of the said S. S., during her confinement in the said house: We do therefore order you, the treasurer of the guardians of the poor of the Witham Union aforesaid, to pay forthwith unto the said churchwardens and overseers of," &c., "the said several sums of," &c., "making in the whole," &c. "And we do further order you, the treasurer of," &c., "to pay also weekly and every week unto the proprietor of the said house the sum of 11*s.*; which said weekly sum of 11*s.* appears to us, the said justices, to be a reasonable charge in that behalf; or such other weekly sum as the proprietor of the said house shall hereafter, and from time to time, reasonably charge for the future lodging, clothing, medicine, maintenance, and care of the said S. S., during such time as she shall be confined as a lunatic in the said house. Given," &c., "at Chelmsford," &c., "this 10th day of May, A. D. 1847.

"SAM. J. SKINNER. (L. S.)

"EDMUND ROUND. (L. S.)"

*The rule to quash was obtained on two affidavits, sworn by [*302 "James Corder of Witham in the county of Essex, gentleman." The first stated: That the Rev. W. Buswell, by whom the order of December 1st was signed, "is not, and was not at the time of the making and signing such order, either rector, vicar, curate, minister, or officiating clergyman of the parish of Little Baddow," from which the pauper was sent to the licensed house under the order; "nor did the said W. Buswell, at the time of the making and signing of such order, hold or fill any clerical office or appointment, or perform any clerical duties or functions in the said parish of Little Baddow; but that the said W. B. then was and still is the rector of the parish of Widford in" Essex, and chaplain to the workhouse of the Chelmsford Union; "and that his duties as chaplain to such union workhouse then were, and still are, confined to the interior of such union workhouse, which union workhouse then was and still is wholly situate within the parish of Chelmsford in the said county." That the said Chelmsford Union then

comprised and still doth comprise twenty-nine parishes in the said county, of which Little Baddow is one. That Jeremiah Suckling, by whom the said order was signed, as overseer of Little Baddow, was not, at the time of the making and signing of such order, one of the overseers of the poor of Little Baddow, nor an inhabitant of the said parish; but that George Taylor and Henry White Joslyn of the said parish, farmers, then were the only overseers of the poor of that parish; and that the said J. Suckling, at the time of the making and signing, &c., was, and still is, a paid assistant-overseer for certain parishes in the said county of Essex, of which Little Baddow then

*303] was, and still is, one; and that he, at the time of the making and signing, &c., resided, and still doth reside, in the parish of Sandow in the said county. And further, that at the time of the making of such order there was not, nor is there now, any county or principal asylum for pauper lunatics in the said county." Corder's second affidavit stated, That the order of adjudication of settlement dated May 10th, 1847, was made by the two justices therein named without the knowledge of the churchwardens and overseers of Hatfield Peverel, or either of them, of any application for such order being intended: and that neither the said churchwardens and overseers of Hatfield Peverel, nor the Treasurer of the Witham Union, received any notice in writing or otherwise of any intention to apply to the said justices for a certain other order, &c. (the second order of May 10th).

Notice was given that the following points would be relied upon in support of the rule to quash. 1. That it appears by the affidavits that the Rev. W. Buswell and J. Suckling had not either of them any authority to make the order of 1st December, 1846: and that order fails to show of what parish the said W. Buswell was the officiating clergyman. 2. That the said order of 1st December, 1846, being void as above, the orders of 10th May, 1847, are also void on that account, and on account of Mr. Buswell and Mr. Suckling not having had authority, &c. 3. That the first order of 10th May, 1847, was made without notice either to any overseer of Hatfield Peverel, or to the guardians or treasurer of the Witham Union, and is therefore void, the law not giving any appeal against such order. 4. That the second order of 10th May,

*304] 1847, is bad, inasmuch as it fails to state facts which show the jurisdiction of the justices, and also inasmuch as it fails to show at what time the settlement of the pauper lunatic was in Hatfield Peverel. 5. That the last-mentioned order is bad as to all future payments, inasmuch as it is not direct and positive, but gives an option to the proprietor of the licensed house to vary the charge for future lodgings, &c., from time to time, so long as the said Sarah Sampson may be confined as a lunatic in that house. 6. That the said last-mentioned order, instead of averring facts, sets out former instruments which

merely recite those facts. 7. That the said last-mentioned order is made on the churchwardens and overseers of the parish of Hatfield Peverel, although that parish is in an union. 8. That the said orders of 10th May, 1847, severally fail to show whether Sarah Sampson was ever chargeable to or resident in Little Baddow, and whether there was any asylum for the county of Essex, and also severally omit to state the various facts necessary to authorize the making of such orders respectively.

Mr. Buswell and Mr. Suckling made affidavit, in opposition to the rule, that no notice was given to either of them of an application for a certiorari to remove the order of December 1st, 1846. Affidavit was also made that, on that day there was not in Essex any county asylum for pauper lunatics. In last Easter term,(a)

Bovill showed cause.—It is a novel course to include three distinct orders in one certiorari. [COLERIDGE, J.—Is not it a common form of certiorari to bring up “all *and singular the indictments,” &c., [*305 “with all things touching the same?”] The writ has been obtained on a rule absolute in the first instance, without notice. And no notice of the present application has been given to Byas; nor does the rule call on him to answer.(b) [COLERIDGE, J.—It would be hardly just that we should decide behind his back that an order on which he has been acting is illegal.] Then, the first document in question is not such an order as can be brought up by certiorari. Stat. 8 & 9 Vict. c. 100, under which it is made, provides for the removal and protection of lunatics, enacting, in sect. 48, as to paupers, that none “shall be received into or detained in any licensed house, or any hospital, without an order and statement according to the form, and stating the particulars required in schedule (D.) annexed to this act, under the hands of one justice or an officiating clergyman, with the relieving officer, or one of the overseers of the union or parish from which such pauper shall be sent;” “nor without a medical certificate according to the form in the said schedule:” “and every person who shall receive any pauper into any such house or hospital as aforesaid, without such order and medical certificate as last aforesaid, shall be guilty of a misdemeanor.” The document is called an order; but it is only a compliance with certain directory provisions. The act does not confer power to remove or detain a lunatic; that might be done at common law: it merely imposes a penalty on the keeper of a licensed house if he receives a lunatic without certain preliminaries: and the order, with the annexed [*306 *certificate, is a protection to the housekeeper against the penalty. The order itself is merely a direction, or rather a permission; and no person, except Byas and the lunatic, has any concern in quashing or

(a) April 25th, 1849. Before PATTESON, COLERIDGE, and ERLE, Js. COLERIDGE, J., left the Court near the close of the argument against the rule.

(b) *Bovill* stated that he was not instructed on behalf of Byas.

upholding it: no parish is interested. In *Shuttleworth's Case*, 9 Q. B. 651 (E. C. L. R. vol. 58), this Court evidently was of opinion that the clauses of the statute respecting lunatics who were not paupers (sects. 45, 46) were directory as to the statements to be made in the order. Byas is called upon, many months after the making of the order on him, to resist a motion which would render him liable to punishment for a misdemeanor. Though there is no statutory limitation of time as to such orders, the rule ought to be the same as that which is laid down for removing orders of justices, by stat. 13 G. 2, c. 18, s. 5. Then, if the first order is not removable, the parties supporting the orders are entitled to judgment as to that: the second and third are not connected with it. [PATTESON, J.—They are by recital.] The first is an order under stat. 8 & 9 Vict. c. 100, independent of the subsequent ones, which are under stat. 8 & 9 Vict. c. 126. It is the authority, and the only one, under which the keeper of the licensed house is entitled to charge the parish for maintenance. The orders of May 10th do not depend upon the first; they recite a previous order as a correct one; *307] and it will not be assumed that a bad order is intended.(a) [PATTESON, J.—*Is there any provision making it obligatory on the keeper of the house to receive a lunatic under such an order and certificate?] None in this statute.

The Court then called upon counsel on the other side to argue the question whether or not the first order was removable by certiorari.

Whitehurst and *Pashley*, *contra*.—The motion should have been to quash the certiorari as improvidently issued: that is the constant practice; *Regina v. Rotherham*, 3 Q. B. 776, 788 (E. C. L. R. vol. 43), *Regina v. Fordham*, 11 A. & E. 73, 79, 80 (E. C. L. R. vol. 39), *Regina v. Cartworth*, 5 Q. B. 201 (E. C. L. R. vol. 48). [ERLE, J.—Suppose a certiorari had issued to bring up a bill of exchange, and a motion were made to quash the bill; would not the course be to discharge the rule? COLERIDGE, J.—Is not it good cause for not quashing an order, that, if we did so, we should exceed our jurisdiction? ERLE, J.—In *Rex v. Lloyd*, Cald. 309, where this Court held that a certain order of quarter sessions was not removable, the Court, after motion to quash the order, discharged the rule and quashed the certiorari at the same time. COLERIDGE, J.—In *Regina v. Coles*, 8 Q. B. 75 (E. C. L. R. vol. 55), the objection to the certiorari was taken in showing cause against a motion to quash the order: and it was contended, but not with success, that the objection to the writ came too late: there, however, the Court held the order to be judicial. ERLE, J.—The Master of the Crown Office says that the precise point, as to the time of taking the objection, was made, and the suggestion overruled.]

(a) *Bovill* likewise argued that the objections to the order of December 1st were groundless: and that, at all events it was conformable, in every material respect, to schedule (D) of stat. 8 & 9 Vict. c. 100. PATTESON, J., observed that the words of that form, "officiating clergyman of the parish," &c., were not pursued. But, as the Court held the document not removable, the argument is not further reported.

*The first document is either framed under stat. 8 & 9 Vict. c. 100, and invalid under that statute; or is a bad order under [*308 stat. 8 & 9 Vict. c. 126. [PATTESON, J.—In the form, schedule (D.) to the first statute, the expression is “we” “hereby request you to receive;” in schedule (E.) No. 1, to stat. 8 & 9 Vict. c. 126, it is “we” “hereby direct you to receive.”] In the order of December 1st, 1846, the word is “direct.” [COLERIDGE, J.—If there is a disagreement as to the weekly sum, is the keeper compellable to receive the pauper? And, if not, is the document addressed to him an order? Is not the transaction a contract?] If he obeys the instrument, he makes it an order. [COLERIDGE, J.—You must contend that the minister and overseer are a court of inferior jurisdiction.] They are, for this purpose, at least under stat. 8 & 9 Vict. c. 126, s. 48. The effect of the clause is to make those who act under it public officers, where a pauper is concerned. [COLERIDGE, J.—It is clear, from the language used, that the present proceeding has not been taken under that clause, but under stat. 8 & 9 Vict. c. 100, s. 48.] Stat. 8 & 9 Vict. c. 126, s. 48, repeals the prior enactment, or engrafts on it a new form of procedure. Were this not so, the justice or clergyman, and overseer, might send a pauper to a licensed house, though there were a lunatic asylum in the county or borough, not full. [PATTESON, J.—The affidavits do not show that information was given by an overseer or medical officer to the justice, or that the justice called a medical officer to his assistance, conformably to stat. 8 & 9 Vict. c. 126, s. 48. In the prior statute, sect. 48 puts the justice or clergyman and the parish officer into the same situation in which private *friends of the lunatic are under sect. 45. If we might [*309 remove orders under sect. 48 we might also remove orders under sect. 45.] The order of December 1st is before the Court, either as a judicial act in itself, or as auxiliary to a judicial act: and the former appears to be the more correct view. The words “being satisfied” are equivalent to an adjudication; *Regina v. Lewis*, 8 A. & E. 881 (E. C. L. R. vol. 35). (a) The power to receive and detain, under stat. 8 & 9 Vict. c. 100, s. 48, and schedule (D.) is based upon the declaration that the clergyman or justice is so satisfied. That is a strong interference with the liberty of the subject; and the foundation of it must be something judicial. “Wherever a power is given to examine, hear, and punish, it is a judicial power;” per HOLT, C. J. in *Groenwelt v. Burwell*, 1 Salk. 144, 200, 396, where it was held that a certiorari would lie to bring up a condemnation by the College of Physicians for mala praxis. In *Rex v. Lediard*, Sayer’s Rep. 6 (which may be cited), the act done was merely ministerial; a mandamus would have gone to compel the justice to issue the warrant. The order here is at least the foundation of the orders of 10th May, and therefore affects their validity; *Regina v. Mar-*

(a) And see *Case of the Sheriff of Middlesex*, 11 A. & E. 273, 287 (E. C. L. R. vol. 39).

tin.(b) And, if the Court will look at the first order in examining into the validity of the others, the question whether or not the first should have been brought up by certiorari becomes unimportant.

The Court then called upon

*310] **Bovill*, in support of the orders of 10th May.—Notice should have been given to Byas, the proprietor of the asylum. And there should have been separate rules to quash the several orders.

As to the objections to the orders. Stat. 8 & 9 Vict. c. 100, contains provisions affecting the management of private lunatic asylums. The statute of the same session, 8 & 9 Vict. c. 126, must be taken in connexion with it. The latter statute is especially directed to the case of pauper lunatics, and to providing asylums for counties and boroughs. It empowers, by sect. 48, the overseer, with the clergyman or justice, to act in certain cases, as the previous statute does: and it gives jurisdiction, by sect. 58, to two justices of the county in which the asylum or the parish from which the pauper is removed is situate to inquire into and adjudicate upon the settlement of any pauper lunatic confined, or ordered to be confined, in the asylum. There is nothing to restrict this enactment to the case of lunatics sent to the asylum under the provisions of chapter 126. Therefore, the removal is good under sect. 48 of chapter 100. Nor would the jurisdiction of the justices be affected by the fact that the lunatic had been sent irregularly: the jurisdiction arises upon the fact of the lunatic being confined or ordered to be confined. Now, on the face of the two orders of 10th May, it appears that the justices are justices of Essex, in which is situate the parish of Little Baddow, whence the pauper is sent. They recite a good order by the clergyman and overseer. If the orders are bad, they may be contested by appeal against the order of maintenance; *Ex parte Monk-*
 *311] *leigh*, 5 Dowl. & L. 404. The first and *second points do not arise except upon the affidavits: but, the jurisdiction to make the orders existing, the affidavits cannot be looked at. The third point is, that the first order of 10th May was made without notice to the parish of Hatfield Peverel, or the union in which it is. [PATTERSON, J.—There is nothing in that.(a)] As to the fourth point: the jurisdiction to order payment arises under sect. 62 of stat. 8 & 9 Vict. c. 126, as the jurisdiction to adjudicate on the settlement arises under sect. 58. It is, however, contended that the order of maintenance is bad, because the recital of the earlier order of 10th May does not show when the pauper was settled in Hatfield Peverel. But the statute does not require this. It is sufficient that the settlement at the time of the adjudication should be stated; because that must be the same as the settlement at the time of the order for payment, inasmuch as no settlement could be acquired while the pauper was in the asylum. The fifth point is that

(a) Note (a) to *Taylor v. Clemson*, 2 Q. B. 1037 (E. C. L. R. vol. 42).

(b) See *Ex parte Monkleigh*, 5 Dowl. & L. 404.

the order as to future charges is uncertain. Sect. 62 requires the justices to order payment "of the reasonable charges of the future lodging," &c. The order finds that 11s. per week appears to the justices a reasonable charge in that behalf, and directs payment of that sum, "or such other weekly sum as the proprietor of the said house shall hereafter, and from time to time, reasonably charge." The justices could do no more than fix the sum which appeared reasonable at the time being: they could not foresee the price of provisions, and other circumstances, which might make what was now reasonable *unreasonable hereafter. If the proprietor demanded a sum, and the [312] parish officers were indicted for refusal to pay it, it would be for a jury to say whether the sum demanded was reasonable. Even if this were a good objection, it would only make the order bad for part; the residue would nevertheless be valid; *Rex v. Maulden*, 8 B. & C. 78 (E. C. L. R. vol. 15). The sixth point is not borne out by the order: the instruments referred to stated the facts; and the order is founded on the instruments. [The counsel supporting the rule abandoned the seventh point.(a)] As to the eighth point: First, the statute does not require chargeability or residence: it is enough that the pauper lunatic is found in the parish from whence he is removed. Secondly, it was not necessary to negative the existence of a county asylum: the jurisdiction attaches upon the pauper being found in the private asylum, whether there was a county asylum or not. If the affidavits are resorted to, they show that in fact there is no county lunatic asylum in Essex.

Whitehurst and Pashley, *contrâ*.—It was not necessary to give notice to the keeper of the asylum, the only question being, which of the two parishes is to pay. One rule is sufficient: that is the opinion of the officers of the Crown Office. But it is sufficient that the last order is properly brought up: the others are brought up merely *ex abundanti cautela*.

As to the first two points: the question being entirely one of jurisdiction, affidavits as to the facts necessary to raise the jurisdiction may be received; **Regina v. Bolton*, 1 Q. B. 66 (E. C. L. R. vol. 41). They show that, even under stat. 8 & 9 Vict. c. 100, s. 48, the [313] removal is without jurisdiction, there having been no order either by a justice or a clergyman officiating in the parish. As to the fourth point. The order of maintenance ought to show jurisdiction on the face of it. Now, if it be defended as warranted by stat. 8 & 9 Vict. c. 100, s. 48, the answer is that under that statute there is no power to order payment at all. The question therefore is whether jurisdiction is shown under c. 126. For this purpose, it ought to appear that the pauper was placed in the asylum under the provisions of that statute. Now, sect. 48 of stat. 8 & 9 Vict. c. 126, requires the order of a justice, except in the case where the lunatic cannot be taken before the justice; and then

(a) See *Regina v. Tyrwhitt*, 12 Q. B. 292 (E. C. L. R. vol. 64).

the justice or clergyman, being satisfied by personal examination, may, subject to certain other regulations, make the order. But here no order of a justice appears; and there is no finding that the lunatic could not be taken before a justice. In sect. 57 of stat. 8 & 9 Vict. c. 126, the case of lunatics "confined under the provisions of this act" is alone contemplated; sect. 58 is a continuance of sect. 57, and gives the power to inquire into the settlement in the same case only: and sect. 62 authorizes the order of maintenance only "in such case," that is, where there has been an adjudication under sect. 58. This is a fatal objection on certiorari, as much as if it did not appear that the right parties had applied: the objection prevailed on certiorari in *Regina v. Smith*, 7 Q. B. 543 (E. C. L. R. vol. 53), though it was not suggested *that
 *314] the application was not properly made in fact, and though a previous case, *Regina v. Ardsley*, 5 Q. B. 71 (E. C. L. R. vol. 48), appeared at first sight adverse to the decision. The words of sect. 62 of stat. 8 & 9 Vict. c. 126, "after any lunatic shall have been sent to an asylum," must be read as if the words were "legally sent;" *Regina v. Justices of Cornwall*, 2 Dowl. & L. 775 (under the former statute, 9 G. 4, c. 40, s. 42). So a plea of no award means No legal award; *Fisher v. Pimbley*, 11 East, 188.(a) It should have been shown when the pauper was settled in Hatfield Peverel. [ERLE, J.—It is shown; the time spoken of is the time of adjudication: change the tense, and the words become unintelligible.] As to the fifth objection: it is suggested on the other side that the reasonableness of such sums as the proprietor may hereafter demand may be inquired into by a jury on the trial of an indictment for non-payment. This would be very inconvenient, and inconsistent with general principles. In *Regina v. Long*, 1 Q. B. 740 (E. C. L. R. vol. 41), it was held that an order made for costs of an appeal by the Quarter Sessions could not be enforced unless the Court fixed the sum during its sittings: *Sellwood v. Mount*, 1 Q. B. 726 (E. C. L. R. vol. 41), is to the same effect. The sum to be paid on a filiation order must be specified therein; 2 Nol. P. L. 303 (4th ed.). It has been held that, if the Sessions order a sum manifestly unreasonable to be paid upon a filiation order, this Court may quash it: but no other authority than the Sessions can fix the sum; *Rex v. Perkasse*, 1 Sid. 363. A similar point seems to have arisen, but not to
 *315] have *been decided, in *Sherman's Case*, 1 Vent. 210. What is a reasonable time for tenant at will to remove his goods after the determination of the will, is matter of law; Co. Lit. 56 b; and so, according to the same authority, is the reasonableness of fines, customs, and services.(b) [PATTESON, J.—It does appear that an order framed in this way may provoke continual litigation; on the other hand, what is reasonable at one time may cease to be so afterwards.] The difficulty

(a) See *Regina v. Grant*, *antè*, p. 43.

(b) See *Startup v. Macdonald*, 6 M. & G. 593, 606 (E. C. L. R. vol. 46).

may be avoided by directing a specific sum to be paid till it shall be otherwise ordered by competent authority. The visitors, under sect. 40 of stat. 8 & 9 Vict. c. 126, may fix the weekly expenses of each pauper. [PATTESON, J.—Perhaps it may be said that this is the meaning of the words “reasonable expenses.” ERLE, J.—Is not the remedy for non-payment rather distress or an action, under sect. 68, than indictment?] There might be indictment also; note (4) to *Rex v. Dickenson*, 1 Wms. Saund. 135 b. And the distress under sect. 68 must be for a specified sum, for “the money so ordered to be paid.” There is no process prescribed for affearing the amount: the avowry under such a distress must state a particular sum. As to the sixth point, *Day v. King*, 5 A. & E. 359 (E. C. L. R. vol. 31), is a conclusive authority against the validity of the order. As to the eighth point, sect. 48 of stat. 8 & 9 Vict. c. 126, shows that such pauper lunatics only as are chargeable are the subject of the statute. And the sending to a private asylum is permitted, by sect. 54, only where there is no county asylum, or under special circumstances, to be stated in the order: whereas there is *no such statement here; and that this makes the order of removal bad appears from *Regina v. Ellis*, 6 Q. B. [*316 501 (E. C. L. R. vol. 51)]. [PATTESON, J.—That was a decision upon an appeal against the order of removal: but can we entertain that objection on a certiorari bringing up the order of maintenance? *Bovill*.—*Regina v. Ellis* was decided on stat. 9 G. 4, c. 40, s. 38, the provisions of which are much more limited than those of stat. 8 & 9 Vict. c. 126, s. 54.] *Cur. adv. vult.*

PATTESON, J., in Trinity vacation (July 5th), 1849, delivered the judgment of the Court.

In this case the substantial question was, whether an order for expenses under stat. 8 & 9 Vict. c. 126, s. 62, is valid in respect of a pauper lunatic received into a licensed house for the reception of lunatics under an order of a clergyman and overseer pursuant to stat. 8 & 9 Vict. c. 100, s. 48, without an application to a justice under stat. 8 & 9 Vict. c. 126, s. 48. We are of opinion that it is.

As the two statutes were passed nearly at the same time, they ought to be construed as intended to come into operation together: and in that case the legislature, in passing the later act, had under its notice that pauper lunatics might be sent to a licensed house under stat. 8 & 9 Vict. c. 100, s. 48. The enactment of the later act, in sect. 62, is general, applying in terms to any lunatic that shall have been sent, whether under the later statute or any other, and repeats a description which had been used in many sections of the *same statute, [*317 comprising two classes; viz. paupers sent from a parish, and paupers sent at the instance of some clergyman or officer of a parish, within which latter class the pauper in question clearly falls.

This question being disposed of in the affirmative, the questions of form remain.

As to the instrument under which the pauper was sent, it appears to be in the nature of a certificate equivalent to that which is given by a friend or relation in the case of a lunatic not chargeable, and not of such a judicial nature as to be removable by certiorari: and it further appears to us that this objection to the issuing of the writ is available in showing cause against quashing an instrument brought up by it. Even if it was before us regularly by affidavit, it would be sufficient to render valid an order of maintenance in as far as it is requisite to show that the pauper was sent at the instance of some clergyman or officer of the parish. With respect to its sufficiency as a compliance with stat. 8 & 9 Vict. c. 126, s. 48, it is not necessary to decide.

As to the objection that the facts essential to authorize an order for expenses are stated by way of recital, that is a sufficient statement; and the decision that the recital of a complaint containing the essential facts is not a recital of the essential facts has no application.

As to the objection that the order is for the payment of 11s. per week, as the reasonable charges at present, or such sum as may be reasonably charged hereafter, it should be borne in mind that the reasonable charge for the maintenance may probably vary; that, in *318] respect of lunatics in the county asylum, provision is made by *this statute for altering the charge from time to time; that under stat. 9 G. 4, c. 40, s. 31, provision was also made for orders varying the charge from time to time; and that the form of enactment is here altered, and the power to make subsequent orders is not expressly given. There is therefore reason for providing for a variation in the charge. The order decides the amount that is reasonable under present circumstances, and gives a power for future variation. The suggested evil, of raising the question of reasonableness by indictment, does not press, as the 68th section provides for the recovery of the money ordered, either by distress or action: and, if either party chooses to raise the question by action, there would be no particular inconvenience in settling by a verdict the reasonable expenses of a lunatic.

Rule discharged with costs.(a)

(a) See the next five cases.

The QUEEN v. The Inhabitants of WOLVERHAMPTON. Nov. 17.

Sect. 58 of stat. 8 & 9 Vict. c. 126, which empowers justices to inquire into and adjudicate upon the settlement of "any pauper lunatic confined or ordered to be confined" in a lunatic asylum, authorizes the proceeding only during the time while the pauper remains in confinement, and the time between the order for his being confined and the beginning of his confinement.

And, if an order for maintenance, under sect. 62, be made on a parish as the last place of a pauper lunatic's settlement, and the adjudication has taken place after the pauper was discharged from the asylum, the order is bad, though the discharge was within twelve months from the beginning of the confinement.

Semble, per COLERIDGE, J., that an order, under sect. 62, directing payment of the expenses of examining and conveying the lunatic to the asylum, may be made more than twelve months after those expenses have been incurred.

HUDDLESTON, in last Hilary term, obtained a rule calling on the prosecutors to show cause why an original order made by two justices of *Lancashire, on 8th July, 1847, and an order of the Sessions, [*319 held at Salford, in and for Lancashire, on 25th October, 1847, confirming the said original order, should not be severally quashed for the insufficiency thereof. The two orders had been brought up by certiorari.

The original order was as follows.

"County of Lancaster, to wit." "At," &c., "in Salford, in the county of Lancaster, the 8th day of July, A. D. 1847.

"Whereas heretofore, to wit," 14th May, 1846, "one Samuel Wedge, a pauper lunatic, was, pursuant to the statute in such case made and provided, sent, to wit, from the township of Manchester, in the county of Lancaster, to an asylum, registered hospital, or licensed house, to wit, to the asylum situate at Lancaster, in the said county, and was then received into the said asylum, and was confined therein from the said 14th day of May to the 5th day of January last: And whereas afterwards, by an order bearing date this 8th day of July, A. D. 1847, and made on the same day and year last aforesaid, to wit, at Salford, in the same county, under the hands and seals of James Heywood and John Gibson Whitaker, Esquires, two of Her Majesty's justices of the peace in and for the said county, within which said county the said asylum then was and still is situate: reciting that they, the said last-mentioned justices, had, on the day and year and at the place last aforesaid, inquired into the last legal settlement of the said Samuel Wedge, such pauper lunatic as aforesaid, and had obtained satisfactory evidence as to the said settlement of the said S. W.; they, the said last-mentioned justices, did thereby, in due form of law, find and adjudge that the last legal settlement of the said S. W. was in the parish, township, or place of Wolverhampton, in the county of Stafford. And whereas the said parish," &c., "of Wolverhampton, in the said recited order mentioned, was and is a township different from the township from which the said S. W. was sent to the said asylum: Now we, the undersigned, two of Her Majesty's justices of the peace of and for the said county of Lancaster, from a part of which said county, to wit, the township of Manchester, the said S. W. was sent to the said asylum as aforesaid, upon due proof upon oath before us now here had and taken, and upon production before us of the said recited order, Do find and adjudge that all and singular the premises are true, and that The Manchester Union, in the said county of Lancaster (which said last-mentioned Union includes within it the said township of Manchester, from which the said S. W. was sent to the said asylum as aforesaid), has paid and incurred the sum of 9*l*. 19*s*. 4*d*. for expenses in and about the examination of the said S. W., and his conveyance to the said asylum: and that the treasurer of the Guardians of

*320] the said Manchester Union has paid to the treasurer of the *said asylum the sum of 12*l.* 15*s.* 6*d.* for the reasonable charges (incurred within twelve calendar months previous to the date and making of this our order) for the lodging, maintenance, medicine, clothing, and care of the said S. W. in the said asylum. We do therefore, pursuant to the statute in such case made and provided, hereby order and direct that the treasurer of the Guardians of The Wolverhampton Union, in the county of Stafford (which said last-mentioned Union includes within it the said township of Wolverhampton, in which said township the said S. W. has been adjudged to be settled as aforesaid), do forthwith pay unto the treasurer of the Guardians of the said Union of Manchester the said sum of 9*l.* 19*s.* 4*d.* for all expenses incurred by and on behalf of the said last-mentioned Union in and about the examination of the said Samuel Wedge, and his conveyance to the said asylum, and do also forthwith pay unto the said treasurer of the said Manchester Union the said further sum of 12*l.* 15*s.* 6*d.*, the amount of all moneys paid as aforesaid by the said last-mentioned treasurer to the treasurer of the said asylum for the reasonable charges of the lodging, maintenance, medicine, clothing, and care of the said S. W.; which said charges have been incurred within twelve months previous to the date and making of this our order."

The order of the Sessions, held by adjournment on 25th October, 1847, for Lancashire, confirmed the said original order.

Pashley now showed cause.—The first question is, whether an order for the payment of the expenses of maintaining a lunatic pauper in an asylum to which he has been removed can be legally made on the parish of his settlement, not being the parish whence he was removed, when he has been discharged from the asylum within twelve months of his being removed to it, and the settlement has not been adjudged till after the discharge. Under stat. 17 G. 2, c. 5, s. 20, a lunatic might, by order of two justices, be confined in the county or precinct wherein he was found, if he was settled in any place in the county; if not, he was to be sent to the place of his last legal settlement, and confined in the *321] county or precinct wherein it was situate; *and, if his own estate was insufficient to defray the charges of removal and maintenance, two justices were to make an order for payment upon the parish officers of the place of settlement. Stat. 48 G. 3, c. 96, s. 17, made a similar provision for the maintenance of the lunatics in county asylums. This, in cases where no county asylum had been established under the last-mentioned act, was extended to licensed lunatic asylums by stat. 59 G. 3, c. 127, s. 1. Stat. 5 G. 4, c. 71, s. 3, authorized two justices, in cases where a lunatic "shall be by the order of two justices confined in any lunatic asylum," to inquire into and adjudicate upon the place of last legal settlement, and forthwith to make an order on the parish officers of such place for payment of weekly maintenance. This enactment did not enable justices to make a retrospective order; *Rex v. Maulden*, 8 B. & C. 78 (E. C. L. R. vol. 15). Stat. 9 G. 4, c. 40, s. 1, repealed the statutes before mentioned. By sect. 38 of this statute, one justice might order the overseers of a parish wherein was a chargeable lunatic to bring him before two justices, who were authorized to remove him to the county lunatic asylum if there was one, but other-

wise to a licensed asylum; and they, or any other two justices of the county, might make an order on the parish officer of the place where the last legal settlement should be adjudged to be, for payment of all reasonable charges of conveying the lunatic to the asylum, and of a weekly sum for maintenance. Sect. 42 authorized an inquiry at any time into the last legal settlement of a pauper confined in a lunatic asylum. Sect. 44 placed dangerous lunatics, unless their estates *were more than sufficient to maintain their families, on the footing of chargeable lunatics. These provisions also gave no [*322 power to make a retrospective order; *Rex v. St. Nicholas, Leicester*, 3 A. & E. 79 (E. C. L. R. vol. 30), *Regina v. Darton*, 12 A. & E. 78 (E. C. L. R. vol. 40). In the former of these two cases the pauper appears to have been in the asylum when the order of maintenance was made. Afterwards stat. 8 & 9 Vict. c. 126, passed; under which the question now arises. The intention of the legislature clearly was to enlarge the powers before given. Sect. 27 shows that they had under consideration the cases of curable lunatics. The general policy of all the enactments has been that the parish in which the lunatic is found shall not, unless it be the place of settlement, be burthened with the charge of maintenance: and, in further pursuance of this policy, it has been recently enacted, by stat. 12 & 13 Vict. c. 103, s. 5, that, even where the lunatic is irremovable under the ordinary poor law from the parish in which he is found by reason of a five years' residence within stat. 9 & 10 Vict. c. 66, s. 1, the parish, if in an union, shall not bear the charges alone, but such charges shall be thrown on the common fund of the union.(a) Then sect. 58 of stat. 8 & 9 Vict. c. 126 (so far as regards the circumstances of this case) makes it lawful for any two justices for the county "from any part of which any pauper lunatic shall have been sent, at any time to inquire into the last legal settlement of any pauper lunatic confined or ordered to be confined therein," and to adjudicate on the settlement. If this were to be so construed as to make it the interest of the removing parish or the county to have the pauper detained till *his settlement could be inquired into, the effect would be directly [*323 against the intention of the legislature. Every facility for inquiring into the settlement, before the county is burthened, is given by sect. 59: it cannot be supposed that this power was intended to cease by the mere departure of the pauper from the asylum. The language of sect. 62 is general: "if, after any lunatic shall have been sent to an asylum," &c., "it shall be adjudged that such lunatic is settled in a parish different from the parish from which, or at the instance of some clergyman or officer of which, he was sent to such asylum," &c., "then and in such case it shall be lawful" for two justices to make the order for payment. Sect. 65 enables the visitors to discharge a lunatic on the undertaking of his friends that he shall be no longer chargeable to

(a) See *Overseers of Wigton v. Overseers of Snaith*, 16 Q. B. 496 (E. C. L. R. vol. 71).

any union, &c., a provision inconsistent with the doctrine that the mere discharge releases from previous liability if the settlement has not yet been adjudicated upon. Sect. 61 shows the primary liability imposed on the parish from which the removal is made, until there is an adjudication. To meet the inference arising from the words "at any time" in sect. 58, it will be argued that this case is excluded by the words "confined or ordered to be confined therein." But that is not a description of the status in which the pauper is required to be, for the purpose of jurisdiction, at the time of the inquiry into the settlement: it describes merely what preliminary circumstances must have occurred before the inquiry can take place. Even admitting that the word "confined" limits the time to the continuance of the confinement, the words "or ordered to be confined" must be applicable to all the time *324] after the order. It is true that *the words are not "who shall have been confined:" but that is the obvious meaning; and, in so construing them, the Court will be acting on the principle of construction adopted as to stat. 9 & 10 Vict. c. 66, s. 1, in *Regina v. Christchurch*, 12 Q. B. 149 (E. C. L. R. vol. 64). Among other instances of constructions put upon statutes, enlarging the words in order to meet the intention of the legislature, are: in the case of stat. 8 Ann. c. 14, s. 1, *Dixon v. Smith*, 1 Swanst. 457; of stat. 29 C. 2, c. 7, s. 1, *Regina v. Justices of Middlesex*, 5 Dowl. & L. 580; of stat. 6 & 7 W. 4, c. 38, s. 3, *M'Kenna v. Pape*, 1 H. L. Ca. 6. (He also cited *Butler and Baker's Case*, 3 Rep. 25 a, 27 b, *Eyston v. Studd*, Plowd. 459, 467.)

Secondly, it is objected that the order is bad, for not showing that the expenses of examining the pauper and conveying him to the lunatic asylum were "incurred within twelve calendar months previous to the *325] date" of the order. But those words, in sect. 62,(a) *refer only to the subject-matter immediately preceding, the moneys paid by the treasurer or overseers to the treasurer of the asylum. The legislature merely meant to limit the extent to which the parish of the settlement should be liable for charges of maintenance. The word "and" joins the words "incurred within," &c., to the word "paid."

(a) Stat. 8 & 9 Vict. c. 126, s. 62, enacts that, where the lunatic is adjudged to be settled in a parish other than that from which he was sent to the asylum, registered hospital, or licensed house, it shall be lawful for two justices to make an order upon the treasurer of the union comprising the settlement parish, or upon the overseers of that parish, "for payment to the treasurer of the guardians or overseers of the first-mentioned union or parish" (Sic; but evidently meaning the parish secondly mentioned) "of all expenses incurred by or on behalf of such union or parish in or about the examination of such lunatic, and his conveyance to the asylum, hospital, or house, and of all moneys paid by the treasurer of the guardians, or the overseers of such first-mentioned union or parish, to the treasurer, officer, or proprietor of the asylum, registered hospital, or licensed house for the lodging, maintenance, medicine, clothing, and care of such lunatic, and incurred within twelve calendar months previous to the date of such order, and also for payment to the treasurer, officer, or proprietor of the asylum, registered hospital, or licensed house, of the reasonable charges of the future lodging, maintenance, medicine, clothing, and care of such lunatic."

Huddleston, contra.—The order does not turn upon the pauper having been “ordered to be confined;” these words are not used. The finding is, merely, that he was in actual confinement, which was terminated at the date of the adjudication; so that he was not then confined. No power is given to adjudicate afterwards: the hardship, if it be one, has arisen from laches in not inquiring earlier into the settlement. The legislature intended that, as soon as the lunatic pauper was sent to the asylum, it should be ascertained where he was settled, or else ascertained that this could not be discovered; in which latter case the order would be made on the county treasurer, by sects. 59, 63. (He was then stopped by the Court.)

COLERIDGE, J.—I think that, giving the words of stat. 8 & 9 Vict. c. 126, a reasonable interpretation, this order is not authorized by it. The case may be put as depending on sect. 58; for, if the order of adjudication, which is recited, be not warranted by that section, the whole order of maintenance is clearly bad. It is almost admitted that, if the case stood merely on the word “confined,” the order could not be sustained, because that would limit the power of adjudication upon the settlement to the time during which the confinement *lasts. [*326 The question then arises upon the words, “or ordered to be confined.” Do these designate the time following the order and preceding the actual confinement, or do they designate the whole time subsequent to the order? If the latter, they comprehend all subsequent time, however remote: no limit is imposed: the settlement may be examined into at any time, though, it is true, only one year’s expenses can be ordered to be paid. On that construction, what would be the use of the previous word “confined,” which would specify a part only of the whole time comprehended in the words following? We must, therefore, limit those following words to the time preceding the actual confinement; and we must hold that the magistrates had no power to inquire into the settlement after the pauper had been discharged from confinement. It is said that inconvenience will follow from this construction. I own I see none: but at any rate we cannot make the law. As to the second point, I have heard only Mr. *Pashley*: at present I think his construction is right.(a)

WIGHTMAN, J.—I am of the same opinion. If there be any doubt, it must be founded on the words “ordered to be confined;” whether these words authorize an inquiry into the settlement at any time whatever which is posterior to the order. I think that construction cannot be put on the words, any more than it could be said that the power of examining into the settlement of a chargeable pauper extends to all the time posterior to any moment of chargeability. The words seem to me to apply to no time later than the pendency of the order.

(a) See *Regina v. Winster*, p. 344, post.

*327] ***ERLE, J.**—The question is, whether, after a pauper has been discharged from a lunatic asylum, he answers to the words “confined or ordered to be confined.” Is he confined? It appears that he is not: it seems that he is neither lunatic nor chargeable. He has once been in confinement; but he is not, therefore, properly described now as “confined.” The same observation is applicable to the words “ordered to be confined:” they relate to an order still existing as an order, and not executed. The necessary facts, therefore, did not exist at the time when the settlement was adjudicated upon: and the rule for quashing the order of maintenance must be made absolute.

Rule absolute.(a)

(a) See the preceding and the next four cases.

The QUEEN v. The Inhabitants of RHYDDLAN. [Feb. 15, 1850.]

On appeal against an order for maintenance of a lunatic pauper, under stat. 8 & 9 Vict. c. 126, s. 62, by a parish adjudged to be the last place of legal settlement, the grounds of appeal stated a settlement by reason of the pauper's mother being *entitled to and in possession of a freehold tenement* situate in the respondent parish, and having resided there for forty days up to and at the time of the order, the pauper being unemancipated. It was not stated whether the estate was purchased, or how acquired. Held that, upon grounds so generally stated, the appellants could not prove that the mother had purchased a freehold estate in the parish, and resided thereon.

On such an appeal, it is not a good objection to the order, that the lunatic pauper was not brought before the justice by warrant from him after notice from the relieving officer, according to stat. 8 & 9 Vict. c. 126, s. 48, the enactments in that respect being directory only, and the justice having jurisdiction, in whatever way such lunatic pauper is brought before him.

On appeal, by the overseers of the parish of Llanengan in Carnarvonshire, against an order of two justices made upon the Treasurer of the Guardians of The Pwllheli Union, the Sessions quashed the order, subject to the opinion of this Court upon a case substantially as follows.

*328] ***On the trial of the appeal, the following four orders were proved.**

First:

“I, William Shipley Conwy, Esquire, one of Her Majesty's justices of the peace in and for the county of Flint, having called to my assistance a surgeon, and having personally examined Dinah Jones, a pauper, now chargeable to the parish of Rhyddlan, in the county of Flint, and I being satisfied that the said D. J. is an insane person, and a proper person to be confined: I hereby direct you to receive the said E. J., as a patient, into your asylum, hospital, or house (there being no county or borough asylum within the said county of Flint). Subjoined is a statement respecting the said D. J. Dated at Rhyddlan, in the county of Flint, the 11th day of July, 1846.” (The statement followed.) Directed “to the proprietor of Haydock Lodge licensed house or lunatic asylum, in the county of Flint.”

Second :

"County of Flint, to wit. To the overseers of the poor of the parish of Rhyddlan, in the county of Flint. Whereas Dinah Jones, a pauper, residing in the parish of Rhyddlan, in the county of Flint, having been deemed insane, was this day brought before me, William Shipley Conwy, Esquire, whose name is hereto set and seal affixed, being one of Her Majesty's justices of the peace for the said county of Flint, in pursuance of my order for that purpose, by Richard Gerard, relieving officer for the said parish of Rhyddlan, to be examined touching the sanity of her mind, and, having called to my assistance a surgeon (not being the medical officer of such parish), and having also personally examined the said D. J., I was satisfied that the said D. J. was an insane person, and a proper person to be confined; and I did, by an order under my hand, direct," &c. (reciting the former order): "And the said D. J. has been confined, and is now confined, in such asylum, pursuant to such order, accompanied with the surgeon's certificate, and relieving officer's statement, required by the statute in such case made and provided: These are therefore to order you, the said overseers of the poor of the said parish of Rhyddlan, to pay to the treasurer, officer, or proprietor of the said asylum the reasonable charges of the lodging, maintenance, medicine, clothing, and care of the said D. J. in the said asylum, so long as she shall be confined therein. Given under my hand and seal at Rhyddlan, in the county of Flint, the 11th day of July, 1846."

Third :

"County of Flint, to wit. To the overseers of Rhyddlan," in, &c., "and to the overseers of the poor of the parish of Llanengan, in the county *of Carnarvon. Whereas Dinah Jones, a single woman and a pauper lunatic, residing [*329 in and chargeable," &c.: stating the removal of the lunatic under the first order, and that the pauper was still confined in the asylum, and that, the undersigned, W. S. Conwy and Edward Lewis Richards, justices of the peace for Flint, on the complaint of the churchwardens and overseers of Rhyddlan, having inquired into the place of her last legal settlement, the justices did thereby, pursuant to the statute, &c., adjudge the same to be in the parish of Llanengan, in the county of Carnarvon. Dated 8th June, 1848, and signed and sealed by the two justices.

Fourth :

"To the Treasurer of the guardians of The St. Asaph Poor Law Union, in the county of Flint, in which union the parish of Rhyddlan is situate; and to the Treasurer of the Guardians of The Pwllheli Poor Law Union, in the county of Carnarvon, in which union the parish of Llanengan is situate; and to the overseers of the poor of the said parish of Llanengan. County of Flint, to wit. Whereas Dinah Jones, a single woman," &c. (reciting the removal of the lunatic under the first order, and also the second and third orders): "These are therefore to order you, the treasurer of the Guardians of The Pwllheli Poor Law Union, in which union," &c., "to pay to the Treasurer of the Guardians of the St. Asaph Poor Law Union, in which union," &c., 6*l.* 4*s.* 6*d.*, expenses of examination and conveyance, and 26*l.* 15*s.* 6*d.*, paid by the overseers of Rhyddlan to the treasurer, &c., of the asylum, for lodging, maintenance, &c., and to pay to the treasurer, &c., of the asylum the reasonable charges of lodging, &c., from the date of the order, so long as the pauper should be confined. Dated 8th June, 1848. Signed and sealed by the same two justices.

The notice and several of the grounds of appeal were set out in the case. The fortieth and forty-first were as follows.

Fortieth. Because the said Ruth Jones, the mother of the said Dinah Jones, is legally settled in the said parish of Rhyddlan; and

because the said Dinah Jones is legally settled in the said parish of Rhyddlan, her mother's said settlement therein being legally communicated to her.

Forty-first. Because, at the time, and for forty days next previous *330] to the time, of the making of the *said first-mentioned order of W. S. Conwy (if any such order hath been made), the said Ruth Jones was legally entitled to, and in possession of, a certain freehold tenement, situated in the said parish of Rhyddlan, and because the said Ruth Jones has been resident in the said parish of Rhyddlan for forty days next previous to and up to the time of the making of the first-mentioned order of W. S. Conwy (if any, &c.), and because the said Dinah Jones then was and now is unemancipated from her said mother.

On the hearing of the appeal, it appeared that the respondent parish was included in the St. Asaph Poor Law Union at the time of the making of the order of W. S. Conwy, dated 11th July, 1846, for the confinement of the said lunatic pauper. And it also appeared that the lunatic pauper was brought before W. S. Conwy at the instance and by the authority of the relieving officer of the said union. But it was not proved that any previous order had been made by W. S. Conwy requiring the said relieving officer to bring her before him.

It was contended by the appellant parish, under certain grounds of appeal, (a) that the order of W. S. Conwy, for confining the lunatic, was bad, because it did not appear, on the face of that order or the examination, that the lunatic pauper had been brought before W. S. Conwy by the relieving officer of the St. Asaph Poor Law Union by virtue of a previous order under the hand and seal of the said W. S. *331] Conwy, requiring such relieving officer to bring her before *him in pursuance of the provisions contained in the Act, &c.

And it was also contended, under another ground of appeal, that the said order for the confinement of the lunatic was bad, because it did not appear, on the face of the examination, that legal evidence had been given before W. S. Conwy, before he made his said order, that she was chargeable to the respondent parish at the time of the making of the last-mentioned order.

And it was also contended, under other grounds of appeal, that the said order was bad on the face of it, because it was not, as they contended, made, signed, and directed according to the form of the Schedule (E) No. 1, annexed to stat. 8 & 9 Vict. c. 126.

And it was further contended, under other grounds of appeal, on behalf of the appellants, that, inasmuch as the last-mentioned order of W. S. Conwy was (as the appellants contended) bad for all or some or one of the reasons or grounds above mentioned, all the other orders

(a) These raised the disputed points in various forms. It has not been thought necessary to set out any but the 40th and 41st.

above set out and made subsequent thereto, or founded thereon, were also null and void in law, as being made without jurisdiction or foundation to make the same.

The Sessions overruled the said several objections, subject to the opinion of the Court of Queen's Bench on the validity of the objections.

It was further contended, on behalf of the appellants, under other grounds of appeal, that the order of W. S. Conwy and E. L. Richards, of maintenance, dated 8th June, 1848, was bad in law on the face thereof, because the complaint, stated in the last-mentioned order to have been made by the churchwardens and overseers of the poor of the respondent parish, *was insufficient in law to warrant the making [*332 of the last-mentioned order.

The Sessions overruled the said objection to the last-mentioned order, and held that the same was good in law on the face thereof, subject to the opinion of the Court of Queen's Bench on the said objection thereto.

The Sessions then proceeded to hear the merits of the settlement of the lunatic; and it was proved before them, by the respondents, that the pauper was born in July, 1811: that she was then settled in the appellant parish (under a derivative settlement from her father), and retained such settlement up to the time of her removal to the lunatic asylum as hereinafter mentioned, unless the Sessions were warranted in adjudging that she had lost the same, and acquired a new settlement, under the circumstances hereinafter mentioned. And it was also proved that, from the time of her birth until her removal to the lunatic asylum as hereinafter mentioned, she resided with her mother Ruth Jones, widow, her father having died in 1817: and that, in 1846, the pauper, having become lunatic, was removed to Haydock Lodge lunatic asylum, under the order of the said W. S. Conwy, of 11th July, 1846, hereinbefore mentioned.

In answer to this case of the respondents, the appellants, under the fortieth and forty-first grounds of appeal, undertook to show that the derivative settlement of the lunatic from her father had been superseded by a subsequent derivative settlement under her mother, acquired after the father's death. And they proposed to prove, by the verbal cross examination of the said Ruth Jones, the pauper's mother, that, in *1841, the said Ruth Jones acquired a settlement by the purchase of a freehold estate in the respondent parish, and a residence thereunder; and that the said lunatic also acquired such settlement in right of her mother. It was contended, on behalf of the respondents, that the appellants were not at liberty, under the fortieth and forty-first grounds of appeal, to give evidence of the said alleged settlement by purchase of the said estate, inasmuch as the last-mentioned grounds of appeal were not sufficiently explicit, and did not furnish the respondents with sufficient information as to any such settlement. And [*333

it was also objected that the evidence offered, being the parol evidence of the pauper's mother, was inadmissible without producing or accounting for the deed or deeds of conveyance of the said freehold estate.

The Sessions were of opinion that the fortieth and forty-first grounds of appeal were sufficiently explicit to entitle the appellants to give in evidence the subsequent settlement by estate, and that the parol evidence of Ruth Jones was admissible for this purpose: and they received the evidence, and held, upon the verbal statement of Ruth Jones, that she had acquired an estate by the purchase of a freehold house and premises in the respondent parish for a sum exceeding 30*l.*, and by a residence in the parish; and that the pauper was settled in the respondent parish by a derivative settlement from her mother. And they quashed the order of maintenance, upon the merits of the said settlement, subject to the opinion of the Court on this case.

If this Court should be of opinion that the appellants were not entitled, under the fortieth and *forty-first grounds of appeal, to
*334] give in evidence the said subsequent settlement by estate in the respondent parish, then the said order of maintenance was to be confirmed, upon the merits of the said settlement, and the said order of Sessions quashed; unless the Court should be of opinion that the said order of maintenance appealed against was bad by reason of any of the objections which had been previously taken by the appellants to the said first-mentioned order of the said W. S. Conwy, or by reason of the said objection to the statement of the complaint in the said order of maintenance; in which case the said order of maintenance was to be quashed, by reason of such objection or objections so invalidating the same, and the said order of Sessions to stand confirmed.

Townsend, in support of the order of Sessions.—The objections to the preliminary proceedings will be immaterial, if the Sessions were right in going into the merits of the settlement under the fortieth and forty-first grounds of appeal. Those grounds were sufficient. The fortieth ground shows that a derivative settlement from the mother was relied on: and the forty-first shows the nature of that settlement with sufficient clearness, and that it was intended to prove a settlement by the ownership of a freehold estate. The forty-first ground alleges residence. No greater precision was necessary; *Regina v. Melksham*.(a)

(a) Wednesday, June 4th, 1845. The Sessions had in this case confirmed an order for the removal of a pauper to the parish of Melksham in Wiltshire, subject to a case. By the examinations, it appeared that the settlement in Melksham was insisted upon, on the grounds, first, of settlement by estate, secondly, of relief. The second ground became immaterial. As to the first, the pauper in his examination stated that his father was settled in Melksham, by having inherited a cottage from his (the father's) father, where the pauper's father had resided for several years previous and up to his death, on which the cottage descended to the pauper as his eldest son; and that the pauper had never occupied the cottage nor resided forty days in Melksham. The question reserved was, whether the examinations showed a settlement in Melksham.

Pashley, in support of the order of Sessions.—The value is immaterial, and so is the residence, the settlement being by an estate inherited.

Hodges, contra.—The nature of the tenure should have been shown. If the mere possession

It does not appear that the *estate was purchased: no deed is shown. An equitable estate would be sufficient for the settlement. [*835]

The Court then called on

G. Hayes and *E. Beavan*, contra.—The fortieth and forty-first grounds of appeal are insufficient; for they omit to state the essential particulars of the settlement to be relied on, and afford the respondents no sufficient means of inquiry. A settlement by estate may arise by the act of the party, or by act of law. In the former case, by stat. 9 G. 1, c. 7, s. 5, purchase-money to the amount of 30*l.* must be actually paid: in the latter case, the value is immaterial. The grounds ought to have shown that in the present case it was intended to rely on a settlement by purchase, and on payment of the requisite purchase-money, as one of the essential ingredients of that description of settlement, or to have *alleged that the estate came by act of law. It has been established by many decisions that all the essential [*836] ingredients of the settlement must be expressly stated; *Regina v. Old Stratford*, 2 Q. B. 513 (E. C. L. R. vol. 42), *Regina v. Bovey*, 2 Q. B. 500 (E. C. L. R. vol. 42), *Regina v. Stoneleigh*, 2 Q. B. 530 (E. C. L. R. vol. 42), *Regina v. Stowford*, 2 Q. B. 526 (E. C. L. R. vol. 42), *Regina v. The Justices of the Eastern Division of Sussex*, 10 A. & E. 682 (E. C. L. R. vol. 37).

The Court then called upon counsel for the appellants to resume their argument.

Townsend, *Foulkes*, and *Winn*, in support of the order.—The present case is distinguishable from those cited, because the fortieth ground shows that the pauper acquired a derivative legal settlement from her mother; and this alone would be sufficient. But, even if that were not so, the forty-first ground gives sufficient notice of the nature of the mother's settlement; and since stat. 11 & 12 Vict. c. 31, the Court will be less strict than formerly in construing grounds of appeal; more especially in a case like the present, where the Sessions have adjudicated on the merits. Further, the original order for confining the pauper was defective; and this is a good ground of appeal. Sect. 48 of stat. 8 & 9 Vict. c. 126, prescribes the mode of proceeding in the case of pauper lunatics. The relieving officer of the union is to give notice to the magistrate in the first instance; and the magistrate is thereupon to issue an order under his hand and seal, directing the lunatic to be brought before him. No such notice appears to have been given, or

is relied upon, the time should have been stated. [PATTERSON, J.—It has always been thought that a fee might be inferred from possession, if nothing more appeared.] *Hodges* then declined to press the objection farther.

Lord DENMAN, C. J.—The Sessions have done right in everything except granting a case.

PATTERSON, WILLIAMS, and COLERIDGE, Js., concurred.

Order confirmed.

From the notes of R. Hall, Esq. The case was cited, on the argument, from 2 New Sess. Ca. 40.

*337] order made, *in this case; and the order for confining the lunatic was therefore irregular, and coram non judice. And, again, as that order was the foundation of the subsequent orders of settlement and maintenance, the whole proceedings must be invalid for want of original jurisdiction. [COLERIDGE, J.—If the lunatic were in the asylum, might not two justices make an order adjudicating the settlement under sect. 58, without inquiring as to the mode in which the lunatic had been originally sent thither? Would any irregularity in the preliminary proceedings affect their power to adjudicate?] They would not have such power, because the pauper would be in illegal custody. When a particular statutory form of proceeding is directed, any material departure from it is fatal; *Davison v. Gill*, 1 East, 64.

PATTESON, J.—The fortieth and forty-first grounds of appeal are insufficient. At first I thought differently; but the decisions with respect to other kinds of settlement remove all doubt. It has been decided that, in cases of hiring and service, and renting a tenement, it is not sufficient merely to say that a settlement was acquired by hiring and service, or renting a tenement in the parish: but every circumstance necessary to constitute the settlement must be stated. So here it was not enough merely to state that the pauper's mother was entitled to and in possession of a freehold tenement, and resided forty days in the parish: it should have been shown how and when the estate was acquired, and, if by purchase, whether purchase-money to the amount of 30*l.* had *338] been paid. But the present *grounds of appeal do not even show whether the estate was acquired by purchase or by act of law. With respect to the other point which has been argued, the question is, whether it was necessary, in order to give jurisdiction, that there should have been, in the first instance, an information by the relieving officer, and an order under the hand and seal of the magistrate, requiring the relieving officer to bring the pauper before him? It appears from the case that, in point of fact, the pauper was taken before the magistrate at the instance and by authority of the relieving officer; but it is contended that she was so taken without due legal authority. Admitting this to have been the fact, I think it did not affect the authority of the magistrate when the lunatic was brought before him; and that the provisions of the statute as to preliminary proceedings were meant as directions to the relieving officer, and not for the purpose of conferring jurisdiction on the justice. When the lunatic is brought before him, I think that he has jurisdiction to make the necessary inquiries, and the order for confinement; and that neither this order nor the orders of settlement and maintenance can be affected by any preliminary irregularity on the part of the relieving officer.

COLERIDGE, J.—As to the first point, I am clearly of opinion that, not only upon the authorities, but upon the broadest principles of justice, these grounds of appeal are insufficient, and do not give the

respondents the information necessary for enabling them to make inquiries about the merits of the settlement intended to be relied on. The grounds merely show that the pauper's mother was entitled to and in *possession of a freehold estate, without giving any information as to the mode in which it had been acquired. In some [*339 cases of settlement by estate value is material, and in others not. And, this being the case of a settlement by purchase, the grounds ought to have shown that such was the fact, and to have afforded such information as would have enabled the respondents to inquire into the question of the amount and payment of the purchase-money. On the other point, I am of the same opinion as my Brother PATTESON, and think the jurisdiction of the magistrate is not affected by any irregularity in the mode in which the lunatic is brought before him.

ERLE, J.—I agree in thinking the grounds insufficient. They ought to give such information as may fairly enable the opposite parties to understand the real nature of the settlement which is to be relied on, and go to the Sessions prepared with counter evidence, where they dispute it. The present grounds of appeal do not state the nature of the title to the land, nor how nor when it was acquired. As to the objection which has been raised to the jurisdiction to make the orders, I think that the provisions of the 48th section as to the mode of bringing the lunatic before the magistrate are directory only. I also think that, in the present case, there should, at all events, be a presumption of jurisdiction until the contrary appears. The parties are of course not to be precluded from inquiring into any material facts, as, for instance, whether the lunatic was a chargeable pauper or not: but here, with respect to the preliminary proceedings, the Sessions merely state that it was not *proved before them that any previous order had been made directing the lunatic to be brought before the magistrate. [*340 I therefore think the Sessions were right in overruling the preliminary objections, but wrong in going into evidence of the settlement under the fortieth and forty-first grounds of appeal.

Order of Sessions quashed.(a)

(a) The Reporters are indebted to G. Hayes, Esq., for the above report.
See the two preceding and the next three cases.

The QUEEN v. The Inhabitants of ST. LEONARD'S, SHORE-DITCH. [Jan. 15, 1853.]

Stat. 12 & 13 Vict. c. 103, s. 5, which throws, in certain cases, the expenses of removing a pauper lunatic to an asylum, and maintaining him there, on the Union comprising the parish which would be liable but for the statute, applies only when the lunatic has been placed in the asylum under an order of justices: not when he has been removed under the order of an officiating clergyman and a parish officer.

ON appeal against an order of two justices, directing the church-

wardens and overseers of the parish of St. Leonard, Shoreditch, in Middlesex, to pay to the churchwardens and overseers of St. Bartholomew the Less, in the city of London, divers sums of money for the lodging, maintenance, &c., of Mary Leach, a lunatic pauper, during the time she should be insane and confined in a licensed house, situate at Peckham in Surrey, the Sessions confirmed the order, subject to the opinion of this Court on the following case.

The pauper lunatic, having resided for more than five years with her daughter in the parish of Saint Bride in the West London Union without having received relief from that or any other parish, became ill; and, in consequence of such illness, was, on 29th May, 1851, admitted into the hospital of Saint Bartholomew, situate in the parish of Saint Bartholomew the Less, in the same Union. When she went to the said *341] hospital, *she intended to return to her daughter's: but, after having been in the hospital about ten days, she became insane there; upon which her said daughter, Sarah Barber, applied to the Guardians of the poor of the West London Union for assistance to remove her from the hospital; and on that occasion they gave her 2s. 6d. for the hire of a cab, and made an order for the admission of the lunatic into their union workhouse. And accordingly, in pursuance of the directions of the said Guardians, she was, on 10th June, 1851, removed from the hospital to and admitted into the union workhouse, situate in West Smithfield, in the city of London, where she remained until 21st June, 1851; when, by an order under the hands of an officiating clergyman of the parish of Saint Bride and the relieving officer of the said West London Union, she was removed to a lunatic asylum situate at Peckham, in the county of Surrey. The union workhouse is the workhouse of the parish of St. Bride, as well as for Saint Bartholomew the Less; and the cost of her maintenance therein was charged by the Guardians of the latter parish. On 9th August, 1851, the overseers of St. Bartholomew the Less obtained an order of justices, adjudging the place of the last legal settlement of the lunatic to be in the parish of Saint Leonard, Shoreditch: and the overseers of that parish were thereby ordered and directed to pay for the past and future maintenance of the lunatic.

The parish officers of Saint Leonard Shoreditch did not deny that the settlement was in their parish, but contended that, the pauper having resided in the parish of Saint Bride for more than five years without *342] *receiving relief, the cost of maintaining her ought to be a charge on the common fund of the union.

If the Court of Queen's Bench should be of opinion that, under the above circumstances, the order of maintenance was legally made upon Saint Leonard's Shoreditch, the order of Sessions was to be confirmed: but, if the Court should be of opinion that the maintenance of the

lunatic should be charged to the common fund of the West London Union, then the order of Sessions was to be quashed.

Huddleston, in support of the order of Sessions.—The parish of St. Leonard, being the parish of the settlement, must, under stat. 8 & 9 Vict. c. 126, s. 62, pay the expenses, unless they are thrown on the Union by stat. 12 and 13 Vict. c. 103, s. 5. But that clause applies only to the expenses, including both removal and maintenance,^(a) of “a lunatic pauper who shall have been or shall be removed under any such order to any asylum,” &c. “Such order,” by reference to the beginning of the section, is “any order of justices.” Here the order is only under the hands of the officiating clergyman and the relieving officer, under stat. 8 & 9 Vict. c. 126, s. 48.

Bodkin, contra.—The 5th section of stat. 12 & 13 Vict. c. 103, ought not to receive the strict interpretation suggested. The intention of the Legislature was to provide different modes of removing lunatic paupers to proper asylums, and then to have them treated, as far as possible, in analogy with the *treatment of ordinary paupers. It cannot have contemplated that any difference in the disposal of [*348 and provision for lunatics once lodged in an asylum should depend upon the mode in which they had been brought thither. The case of a lunatic pauper who is too ill to be taken before the justices appears not to have been particularly provided for.

Lord CAMPBELL, C. J.—It is admitted that the justices here had power to make the order on the parish of the settlement, or else on the Union. Now, before stat. 12 & 13 Vict. c. 103, the order would have been on the parish of the settlement. Mr. *Bodkin* relies on sect. 5 of that statute: and, if that enactment applies, the order should be made on the Union. But, whatever the real intention of the Legislature was, we must judge of it only from the words employed. I certainly cannot see why the enactment should be confined to the case of a removal by justices; but I find it expressly so confined. The words “any such order” must be referred to “any order of justices,” as the last antecedent. Therefore, where, as here, the pauper lunatic has been removed only by the order of the clergyman and the relieving officer, the case stands as before stat. 12 & 13 Vict. c. 103.

COLERIDGE, WIGHTMAN, and CROMPTON, Js., concurred.

Order of Sessions confirmed.^(b)

^(a) See *Overseers of Wigton v. Overseers of Snaith*, 16 Q. B. 496 (E. C. L. R. vol. 71).

^(b) See the three preceding and the next two cases.

*344] *The QUEEN v. The Inhabitants of WINSTER.
[April 24, 1850.]

By stat. 8 & 9 Vict. c. 126, s. 62, when a pauper has been sent by order of justices, &c., to a lunatic asylum, and is afterwards adjudged to be settled in a parish or union other than that from which he was sent, two justices may make an order upon the guardians or overseers of the first-mentioned parish or union for payment to the guardians or overseers of the other parish or union of all expenses "incurred by" them "in or about the examination of such lunatic, and his conveyance to the asylum," "and of all moneys paid by" them to the proprietor of the asylum "for the lodging, maintenance," &c., "of such lunatic, and incurred within twelve calendar months previous to the date of such order."

Held that the limitation to twelve months applies to the expenses of lodging, maintenance, &c., but not to those of examination and conveyance. And an order for payment of both classes of expenses, not showing when any part had been incurred, but only that they had been paid within the preceding twelve months, was, on certiorari, quashed as to the expenses of lodging, maintenance, &c., but not as to those of conveyance and examination.

When orders have been returned to a certiorari, and their validity is argued on the return, it is too late to urge that the objections to the order were not specified in the rule for a certiorari.

In Michaelmas term, 1849, *Pashley* obtained a rule nisi to quash the following order, returned to the Court on certiorari.

The order, dated 27th December, 1848, was made by two justices in and for the county of Nottingham, in which the parish of Bulwell after mentioned was situate. It recited, first, an order made by one of the said justices, dated 25th November, 1846, directing the Superintendent of the lunatic asylum in and for the said county to receive Ann Brown, a pauper, into that asylum. Secondly, an order of the said two justices, dated 27th December, 1848, whereby, after stating that, by virtue of the previous order, Ann Brown had been conveyed from the parish of Bulwell in the Union of Basford, in the counties of Nottingham and Derby, to the said asylum, and had ever since been and then was confined therein; and that the said two last-mentioned justices had inquired into the settlement of the said Ann Brown, and satisfactory evidence had been given before them that her last legal settlement was then in the township and chapelry of Winster in the parish of Youlgrave, in the Union of Bakewell in the county of Derby,
*345] the said *two justices adjudged that the settlement of Ann Brown was in the said township and chapelry of Winster. The order of 27th December, 1848, then proceeded:

"And whereas complaint hath been made to us," &c. (the two justices making this order), "by the guardians of the Basford Poor Law Union, in which the said parish of Bulwell is situate, that they have incurred great expense in and about the examination of the said Ann Brown, and in and about her conveyance to the said asylum; and that they have paid divers sums of money to the treasurer of the said asylum for the lodging, maintenance, medicine, clothing, and care of the said Ann Brown in the said asylum, where she hath ever since been confined at the charge and expense of the said Basford Union, and the said guardians of the said Basford Union therefore now make application unto us" for an order upon the treasurer of the guardians of the said Bakewell Union "for payment to the treasurer of them the said guardians of the said Basford Union of the amount of the said expenses, and of the moneys so paid by them to the treasurer of the asylum as aforesaid: And, it being now satisfactorily proved unto us the said last-mentioned justices upon oath that the said

guardians of the poor of the said Basford Union have heretofore, and *within twelve calendar months before the making of this order*, paid the following sums in respect of the said Ann Brown: that is to say, the sum of 20*s.*, being the reasonable expenses incurred by the said Basford Union in and about the examination of such lunatic and their conveying of her to the said asylum, and also the further sum of 20*l.* 17*s.* 2*d.*, being the amount of the several sums which by the treasurer of the said guardians of the said Basford Union have been paid to the said treasurer of the said asylum for the reasonable charges for the lodging, maintenance, medicine, clothing, and care of such lunatic in the said asylum: We do therefore order you the said treasurer," &c. (of the Bakewell Union), "to pay to the treasurer," &c. (of the Basford Union), "the said several sums of 20*s.* and 20*l.* 17*s.* 2*d.*, making in the whole the sum of 21*l.* 17*s.* 2*d.* And we do further order you," &c. (the treasurer of the Bakewell Union), "to pay to the said treasurer of the said asylum the sum of 14*s.*, being the weekly sum now fixed by the committee of visitors of the said asylum, or such other sum as the said committee shall hereafter from time to time fix in that behalf, weekly and every week from the 27th day of December, 1848, for and during so long time as the said lunatic Ann Brown shall be confined in the said asylum under the said order as aforesaid; the said weekly sum of 14*s.* appearing to us to be a reasonable charge for the future lodging, maintenance," &c., "of the said lunatic. Given," &c.

Denison now showed cause.—First. The objections to the order are not specified in the rule for a certiorari *according to stat. 11 & 12 Vict. c. 31, s. 6, which, on reference to stat. 8 & 9 Vict. c. [346 126, s. 62, must be considered as extending to orders of this kind. Notice of the points relied upon was not given till the service of the rule nisi to quash. [Lord CAMPBELL, C. J.—You are not now showing cause against the rule for a certiorari. The question you raise as to the time of notice ought to have been before us by affidavit.] Then as to the order. It is objected, as to the sum of 20*s.*, that the expenses, to this amount, do not appear to have been, according to stat. 8 & 9 Vict. c. 126, s. 62, (a) "incurred within twelve calendar months previous to the date of such order." But the words of the act do not impose this limit, as to the costs of examination and conveyance. [Lord CAMPBELL, C. J.—The words "incurred within," &c., may override all that precedes.] That is not a reasonable grammatical construction; nor was it adopted in *Regina v. Wolverhampton*, antè, p. 318, 326, where COLERIDGE, J., expressed an opinion against it. As to the 20*l.* 17*s.* 2*d.*: the expenses of lodging, maintenance, &c., are within the restriction as to twelve months; and the objection is that these costs are in the order said to have been "paid," but not said to have been "incurred," within twelve months. But, when it appears that the guardians paid these within the time, it is reasonable to suppose that they were incurred within it. The language must be construed popularly. There is no affidavit that the expenses were in fact so incurred that the magistrates had not jurisdiction to allow them: and, the question being one which involves the jurisdiction itself, affidavits on the *subject might have been put in; *Regina v. Bolton*, 1 Q. B. 66 (E. C. L. [347 B. vol. 41). [PATTERSON, J.—The justices making this order seem to

(a) For the material words of this clause see p. 324, note (A), antè.

have thought it enough that the money was paid within twelve months. The 20s. must have been incurred more than twelve months back.] The word "paid" may refer to payments of expenses incurred during various periods. The Court will prefer that construction which validates instead of defeating the instrument; *Regina v. Aldbrough*, 13 Q. B. 190, 197 (E. C. L. R. vol. 66). At any rate the order may be quashed as to part, but upheld for the rest; *Rex v. Maulden*, 8 B. & C. 78 (E. C. L. R. vol. 15), *Rex v. St. Nicholas, Leicester*, 3 A. & E. 79 (E. C. L. R. vol. 30); the principle of which cases was not disputed in *Regina v. Stoke Bliss*, 6 Q. B. 158 (E. C. L. R. vol. 51). (Another objection was raised, but not insisted upon.)

Pashley, *contra*.—The justices seem to have intended the two sums named to cover the expenses of examination and conveyance, and those of lodging, maintenance, &c., for all the subsequent period. The case is not one in which, on the principles laid down in *Regina v. Bolton*, affidavits are admissible to remove the foundations of jurisdiction. It may be that the order is bad for the 20l. 17s. 2d., and good for the 20s.; though *Regina v. Stoke Bliss* does not support that position. [COLERIDGE, J.—There the two parts of the order could not be separated, and the whole was quashed.] As to the 20s.: in *Regina v. Wolverhampton*, *antè*, p. 326, there was an expression of opinion by one of the Court: but no decision was necessary; and only one side was heard upon the point. The words "and incurred within twelve *348] calendar months," in sect. 62, *override all that precedes as to payment. [Lord CAMPBELL, C. J.—For the latter class of payments, in respect of lodging, maintenance, &c., an order could always be obtained within the limited period; the former class, if within the same limitation, might never be recoverable.] The Legislature did not intend that questions of account should be opened upon events long gone by. Sect. 62 introduces a special power of charging parishes with certain costs retrospectively; a new charge is not to be extended.

Lord CAMPBELL, C. J.—It is a new charge, but also a new relief. This is a good order for the 20s., and so far as the order is prospective. As to the rest, the adjudication of costs of lodging and maintenance, &c., without limit in respect of the time during which they were incurred, cannot be supported: the order must be quashed as to that; not as to the residue.

PATTESON, J., concurred.

WIGHTMAN, J.—The expenses for which 20s. are here charged stand upon a distinct principle. Such expenses may consist of one item, once incurred: the other class are in their nature continuing, and may require to be limited to the period of one year. Taking this view of the subject, sect. 62 may be rendered quite consistent. When it speaks of the expenses attendant on examination and conveyance, the language is quite general; when it speaks of the maintenance, lodging, and

clothing, we find words restricting the allowance to a period of twelve months: and it seems to me that these words are confined to the latter part of the clause. The magistrates here have not used words bringing their *allowance of the latter class of expenses within the pre-scribed limit of twelve months. They may in fact have been incurred during a longer period: and we cannot speculate whether they were so or not. [349]

ERLE, J., concurred.

Rule absolute to quash the order as to 20l. 17s. 2d.(a)

(a) See the next, and the four preceding cases.

The QUEEN v. The Inhabitants of MINSTER.

It is no valid objection to an order of maintenance made, under stat. 8 & 9 Vict. c. 126, s. 62, on a parish adjudged to be the last legal settlement of a pauper lunatic confined in an asylum, that the lunatic is not, on the face of the order, found to be chargeable to the parish whence he was removed, if the order shows that in fact the lunatic has been maintained in the asylum at the expense of such parish.

Nor that notice of such chargeability has not been sent to the parish on which the order is made: and, if this were necessary, it would be enough to send the examinations on which the order was made, if they show the chargeability.

Nor that the medical certificate, annexed to the order for removal to the asylum, varies from the form in Schedule (E) No. 1 of stat. 8 & 9 Vict. c. 126, in not stating the place of abode of the person signing it, or that he was a fellow or licentiate of the College of Physicians or a graduate in Medicine, or a member of the College of Surgeons, or an apothecary authorized by the Apothecaries' Company.

The confinement of the lunatic does not become unlawful by reason of such irregularity, where it does not appear that there was in fact no qualification, or that the residence was in fact not known: and the existence of the qualification, and the fact of the residence being known, may be inferred from the examinations.

The confinement existing de facto, and not being unlawful, the jurisdiction of the justices to adjudicate on the settlement, and to make an order of maintenance, arises.

The keeper of the asylum incurs responsibility by receiving the lunatic without a regular medical certificate; but, having so received him, is bound to continue the confinement until the lunatic is discharged.

THE officers of the parish of Minster in Cornwall appealed, at Quarter Sessions, against the following order.

"Cornwall, to wit. To the churchwardens and overseers of the poor of the parish of Lanteglos by Camelford, in the county of Cornwall, and to Thomas Forster, Esq., treasurer of the guardians of the poor of The Camelford Union, in the said county of Cornwall. Whereas, by a certain order of Samuel Chilcott, clerk, one of Her Majesty's justices," &c., "of Cornwall, made on the 17th day of July, 1847, and directed to the superintendent of the lunatic asylum in and for the county of Cornwall, reciting: That the said Samuel Chilcott, having called to his assistance a surgeon, and having personally examined Joanna Davey, a pauper, and being satisfied that the said J. D. was an insane person, and a proper person to be confined, the said S. C. thereby directed the said superintendent of," &c., "to *receive the said Joanna Davey, as a patient, into the said asylum. And whereas, by a certain other order, under the hands and seals of us the undersigned, John Braddon, Esquire, and Samuel Chilcott, clerk, two of Her Majesty's justices," &c., "of Corn- [350]

wall, in which county the said asylum is situate, bearing even date herewith, after reciting the said first-mentioned order, and reciting that the said J. B. and S. C. had then, in pursuance of the statute," &c., "inquired into the last legal settlement of the said J. D., so ordered to be confined in the said asylum as aforesaid; and, satisfactory evidence upon oath being then given before us that the parish of Minster, in the county of Cornwall, is the place of the last legal settlement of the said J. D., we, the said J. B. and S. C., justices as aforesaid, did thereby adjudge that the said parish of Minster was the place of the last legal settlement of the said J. D.: And whereas the said parish of Minster is one of the parishes included and comprised in the said Camelford Union: And whereas complaint hath been made unto us, the said J. B. and S. C., two of Her Majesty's justices," &c., "of Cornwall as aforesaid, in which said county the parish of Lanteglos by Camelford, from which the said J. D. was sent to the said lunatic asylum, is situate, by the churchwardens and overseers of the poor of the said parish of Lanteglos by Camelford, that they, on behalf of the said parish of Lanteglos by Camelford, have incurred great expense in and about the examination of the said J. D., and in and about her conveyance to the said asylum, and that they have paid divers sums of money to the treasurer of the said asylum for the lodging, maintenance, medicine, clothing, and care of the said J. D. in the said asylum, where she hath ever since been and now is confined at the charge and expense of the said parish of Lanteglos by Camelford: And the said churchwardens," &c., "of Lanteglos by Camelford therefore now make application unto us, the said justices, for an order upon the treasurer of the guardians of the poor of the said Camelford Union, in which," &c., "for payment, to the said churchwardens and overseers," &c., "of Lanteglos by Camelford, of the amount of the said expenses and of the moneys so paid by them to the treasurer of the said asylum as aforesaid: And it being now satisfactorily proved unto us the said justices, upon oath, that the said churchwardens and overseers," &c., "of Lanteglos by Camelford have heretofore, and within twelve calendar months before the making of this order, paid the following sums in respect of the said lunatic J. D.: that is to say, the sum of 1*l.* 12*s.* 10½*d.*, being the reasonable expenses incurred by the said parish of Lanteglos by Camelford in and about the examination of the said lunatic and the conveying of her to the said asylum, and also the further sum of 7*l.* 18*s.*, being the amount of the several sums which by or on behalf of the said churchwardens," &c., "of Lanteglos by Camelford have been hitherto paid to the treasurer of the said asylum for the reasonable charges of the lodging," &c. (as before), "of the said lunatic in the said

*351] asylum: We do therefore order you, the treasurer of the guardians of the poor of the said Camelford Union, to pay forthwith unto the churchwardens and overseers of the poor of the said parish of Lanteglos by Camelford the said several sums of 1*l.* 12*s.* 10½*d.* and 7*l.* 18*s.*, making in the whole the sum of 9*l.* 10*s.* 10½*d.* And we do further order you, the said treasurer," &c., "also to pay, weekly and every week, unto the treasurer of the said asylum, the sum of 7*s.*, or such other sum as the committee of visitors of the said asylum shall hereafter fix, for the future lodging, maintenance, medicine, clothing, and care of the said lunatic J. D., during such time as such lunatic shall remain and be confined in the said asylum: which said weekly sum of 7*s.* hath been this day duly proved on oath to be the weekly sum now fixed by the committee of visitors of the said asylum, and appears to us the said justices to be a reasonable charge in that behalf. Given," &c. (9th February, 1848). Signed and sealed by the two justices.

The Sessions confirmed the order, subject to the opinion of this Court on a case which, so far as regards the points decided, was as follows.

The grounds of appeal were (amongst others):

4th. "That the order appealed against is bad, because it does not appear on the face thereof that the alleged lunatic was chargeable to

Lanteglos by Camelford at the time she was ordered to be removed from thence to the lunatic asylum."

(The 5th ground was abandoned at the commencement of the argument.)

7th. That "the medical certificate, attached to the said order of 17th July, on which (amongst other documents) the justices acted when they made the order now appealed against, is bad on the face thereof, inasmuch as it is not made according to the form contained in the schedule (E) No. 1, annexed to stat. 8 & 9 Vict. c. 126; it not being stated in such certificate that E. L. West, who signed the same, was a fellow or licentiate of the Royal College of Physicians in London, or a graduate in medicine of any University, or a member of the Royal College of Surgeons in London, *or an apothecary duly authorized to practise by the Apothecaries' Company in London; and because the place of abode of the said E. L. W. is not stated on the said certificate." [*352]

11th. "That a notice in writing of the alleged lunatic being chargeable to your said parish of Lanteglos by Camelford was not sent by you to us with the duplicate of the said order now appealed against, and the copies of the examinations on which such last-mentioned order was made."

The following is a copy of the medical certificate.

"I, Edward Lawrence West, being a surgeon, do hereby certify that I have this day personally examined Joanna Davey, the person named in the accompanying statement and order, and that the said Joanna Davey is an insane person, and a proper person to be confined." (Signed) "EDWARD LAWRENCE WEST. Dated the 17th day of July, 1847."

It was admitted by the respondents, on the hearing of the appeal, that they had not sent to the appellants any notice of the said pauper being chargeable to or relieved in the respondent parish, unless such notice were sent by the said respondents having sent to the appellants a duplicate of the order appealed against, and a copy of the examinations.

The case then set out the order (as above), and the examinations; the material parts of which were as follows.

James Davey, father of the lunatic, deposed that she was twenty-nine years old, and that, some little time before July, 1847, "my said child Joanna being then lunatic, I applied to the board of guardians of the Camelford Union for an order for my daughter to go to *the asylum; and, on" 21st July, 1847, "she was removed from [*353] my home at," &c., "in the said parish of Lanteglos by Camelford, by Mr. George Eggins, to the county lunatic asylum," "by an order under the hand of Samuel Chilcott, Clerk," one of the justices, &c., "and she is now confined therein. I know Mr. Edward West, of Camelford, surgeon. I did not pay him for attending my daughter. I am unable to support my said child Joanna, and have not contributed to her

maintenance since she has been so confined in the said county lunatic asylum." He further deposed that the pauper had always resided with him as part of his family, and had never done any act to gain a settlement in her own right.

Edward Lawrence West, surgeon, deposed that, previously to 17th July, 1847, "I visited the said Joanna Davey, by the direction of William Rowe, relieving officer of the said" (Camelford) "Union. I saw her at her father's house. I attended her as a pauper patient."

William Rowe, the said relieving officer, deposed to having given to E. L. West "a medical order in writing to attend the said Joanna Davey, who was then residing in the said parish of Lanteglos by Camelford, and to supply her with necessary medical relief:" and he identified the lunatic as the person mentioned in a certificate of chargeability then produced. The certificate was in the form given by stat. 7 & 8 Vict. c. 101, schedule (C), under the seal of the Board of Guardians of the Camelford Union, dated 4th February, 1848, whereby they certified that, on 17th July, 1847, "Joanna Davey, single woman, became chargeable to the parish of Lanteglos by Camelford, in the said Union, and is still chargeable thereto."

*854] George Eggens, one of the overseers of Lanteglos by Camelford, deposed to having taken the lunatic thence, on the 21st July, 1847, to the lunatic asylum at Bodmin.

William Robert Hicks, the domestic superintendent of the asylum, verified Mr. Chilcott's order of 17th July, 1847, and the medical certificate thereto attached; and deposed to having received the lunatic, in pursuance of the order, on 21st July, 1847, into the county lunatic asylum, and that she "has from that time been, and now is, confined therein. The expense of her maintenance in the said asylum has been charged by me to the said parish of Lanteglos by Camelford."

Claudius Crigan Hawker, clerk to the Board of Guardians of the Camelford Union, deposed to sums paid by or on behalf of the churchwardens and overseers of the poor of the said parish of Lanteglos by Camelford to the treasurer of the said county lunatic asylum, for the lodging, &c., of the said Joanna Davey, incurred within the last twelve calendar months "and charged to the parish of Lanteglos by Camelford." There was a further deposition as to expenses incurred and paid.

The only documents ever sent by the respondents to the appellants consisted of the examinations, and duplicate of the order appealed against.

If the Court of Queen's Bench should be of opinion that the above objections, or any or either of them, ought to have prevailed, the order of Sessions and the order of maintenance were to be quashed; otherwise to be confirmed.

*The case was argued during Michaelmas term, 1850.(a)

Butt, in support of the order of Sessions.—As to the fourth objection: under stat. 8 & 9 Vict. c. 126, it is not necessary that the justices should state the fact of chargeability. The jurisdiction of the justices attaches on their finding the pauper in the lunatic asylum; and the regularity of the preliminary proceedings will be presumed till the contrary appears; *Regina v. Rhyddlan*, antè, p. 327. And the order shows by inference that the pauper was chargeable, inasmuch as it finds the fact of the payment of expenses for her maintenance, &c. Sects. 58 and 62 state, as the condition of the jurisdiction, simply that the pauper shall have been sent to the lunatic asylum. As to the eleventh objection: no notice of chargeability was necessary. Sect. 79 of stat. 4 & 5 W. 4, c. 76, applies only to removals from one parish to another. In *Regina v. Justices of the West Riding*,(b) WILLIAMS, J., expressed that opinion, as to the operation of sect. 79 on a provision in stat. 9 G. 4, c. 40: he, however, made the rule for a mandamus absolute; and, on the argument upon the return in *Regina v. Justices of the West Riding*, 10 Q. B. 763 (E. C. L. R. vol. 59), the full Court agreed with him. In *Regina v. Justices of Middlesex*, 5 Dowl. & L. 9, 21, WIGHTMAN, J., questioned the necessity of sending the notice. As to the seventh objection: it is too late now to inquire whether the proper formalities were observed when the lunatic was first sent to the asylum. In substance, the statute is complied with; in the *certificate West calls himself "Surgeon:" and, this being merely a matter relating to the means of information possessed by the magistrate who sent the lunatic to the asylum, it may now be presumed that the magistrate satisfied himself of the propriety of the step by legitimate means. [ERLE, J.—Were the justices to send the pauper back till a formal certificate could be framed? WIGHTMAN, J.—The orders do not recite the certificate at all, but only state that the justice called to his assistance a surgeon, when he ascertained the lunacy and the propriety of confinement.] The appellants are not entitled to make the objection at this stage. [COLERIDGE, J.—They cannot be said to have waived it till they knew of it. Lord CAMPBELL, C. J.—And they know nothing of the matter till they are served with the order of maintenance.] Neither parish is a party to the preliminary steps: it is not a question as to waiver; it is, in what stage of proceedings a formal objection is cured. The certificate itself could not be removed by certiorari. [ERLE, J., referred to *Regina v. Hatfield Peverel*, antè, p. 298.]

Pashley, contrà.—As to the seventh objection: the intention of the legislature was to protect paupers from being treated as lunatics without full inquiry and evidence. Sect. 57, which makes the pauper chargeable to the parish from which he is sent till he is found to be

(a) November 13th. Before Lord CAMPBELL, C. J., COLERIDGE, WIGHTMAN, and ERLE, J.

(b) Note (a) to *Regina v. Justices of Middlesex*, 5 Dowl. & L. 16.

settled elsewhere, applies only "when any pauper lunatic shall be confined under the provisions of this act;" and the sections that follow must apply in such case only. Sect. 51 expressly prohibits the receiving a pauper into a lunatic asylum without a certificate in *357] the form in schedule (E) No. 1; and sect. 48 makes it essential to the justice's power of ordering the confinement, not only that he shall be satisfied of the lunacy, but that "such physician, surgeon, or apothecary, not being the medical officer of such union or parish, shall sign a certificate according to the form in schedule (E) No. 1, to this act annexed." That form has the words "being a fellow [or licentiate] of the Royal College of Physicians in London [or a graduate in medicine of the University of _____, &c., or a member of the Royal College of Surgeons in London, or an apothecary duly authorized to practise by the Apothecaries' Company in London.]" *Regina v. Rhyddlan*, antè, p. 327, decided only that, where the order of maintenance did not show whether or not the pauper had been brought before the single magistrate on a previous information and order, the order of maintenance was not therefore bad: here the question arises on the order of the single magistrate after the pauper is before him. [ERLE, J.—I think the principle of that decision was, that the legislature meant to give jurisdiction to the magistrates of the county where the pauper lunatic was confined; and that their order of maintenance was not invalidated by the absence of any formality in the steps which brought him thither.] The case shows only that the magistrate may send to the asylum though the proceeding to bring the lunatic before him has not been regular. [*Butt* referred to *Regina v. The Guardians of the Carnarvon and Anglesea Union*, (a) and **Regina v. Wolverhampton*, antè, p. 318.] In *Rex v. Great Salkeld*, 6 M. & S. 408, a female pauper was removed; but the order of removal was quashed on appeal. While she was in the parish to which she was wrongly removed, she was delivered of a bastard child; and it was held that the child was settled in the removing parish, on the ground that this parish could not take advantage of its own wrong. So, here, if the pauper has been

(a) Cited from 3 New Sess. Ca. 708. Wednesday, 28th November, 1849.—The case was reserved at Sessions, on appeal from an order for maintenance of a pauper lunatic. The Sessions had quashed the order: and, in support of the order of Sessions, several points were taken which this Court considered not to be raised by the ground of appeal and the statement of the case. These were abandoned on the argument: but one objection was pressed: namely, that the magistrate, who sent to the lunatic hospital, did not by an order require the relieving officer to bring the lunatic before him, within three days of notice to the magistrate, in pursuance of stat. 8 & 9 Vict. c. 126, s. 48. The Court (PATTESON, COLERIDGE, and ERLE, Ja.) pointed out that the case did not show that the magistrate did not make such an order, but only that the pauper (who, as the case found, was unfit to be taken before the magistrate) was not brought before him in that time, nor at all, the magistrate having gone to the pauper on the 11th day after he received the notice. This point was then no farther pressed; and the order of Sessions was quashed. ERLE, J., said that he was inclined to take up the jurisdiction to make an order of maintenance at the point of the confinement; but that it was not necessary to decide this, though such a view would probably have a salutary effect by preventing litigation. *Townsend* supported the order of Sessions: *Welsby* and *Aspland*, contra, were not heard.

illegally placed in the lunatic asylum, no right is acquired by her being so placed. According to the argument on the other side, the order of Sessions would be right though there had never been any surgeon's certificate at all. It is urged that such a certificate cannot be brought before this Court by certiorari; but that shows that the question is properly raised by this proceeding and at this stage. It is true that in *Shuttleworth's Case*, 9 Q. B. 651 (E. C. L. R. vol. 58), this Court held it unnecessary that there should be a strict compliance, as to the order and certificates, with the *requisitions of stat. 8 & 9 Vict. c. 100, ss. 45, 46: but there the question arose upon habeas corpus, and the Court refused to discharge the person confined, inasmuch as the return showed that she was of unsound mind, and could not safely be at large. It does not follow that an order for the expenses would have been made. In *Lumley's New Lunacy Acts*, p. 177, note 7, it is said that, in order that stat. 8 & 9 Vict. c. 126, s. 62, may apply, the pauper lunatic "must have been legally sent, that is, sent in conformity with the previous provisions:" and reference is there made to *Regina v. Justices of Cornwall*, 2 Dowl. & L. 775, where it was held that an order for payment of expenses could not be made, under sect. 42 of stat. 9 G. 4, c. 40, if the removal to the asylum had been made by an insufficient authority. As to the eleventh objection: there should have been a notice of chargeability. [Lord CAMPBELL, C. J.—The lunatic must be chargeable to some one.] The question is, whether the provisions of the statute have been so complied with as to give jurisdiction to make the present order. The pauper might be chargeable to the county. [ERLE, J.—Suppose she were not chargeable at all.] When a pauper is chargeable, the parish called on to pay is entitled to notice. Sect. 62 puts the appeal on the same footing as appeals against orders of removal: and there the want of notice of chargeability is a fatal objection. *Regina v. Justices of the West Riding*, 5 D. & L. 16, note (a) (in the Bail Court and in this Court), was a case under stat. 9 G. 4, c. 40, s. 54, where the words are "as appeals against orders of removal are now heard and determined:" and, at the time when that statute passed, there was no necessity for the preliminaries afterwards required by stat. *4 & 5 W. 4, c. 76, s. 79. WIGHTMAN, J., in *Regina v. Justices of Middlesex*, 5 D. & L. 9, clearly thought that, in some particulars at least, stat. 4 & 5 W. 4, c. 76, was incorporated with stat. 8 & 9 Vict. c. 126, though not with stat. 9 G. 4, c. 40. And, if the incorporation exist as to some particulars, as the sending the examinations, why not as to the sending notice of chargeability? [WIGHTMAN, J.—In all cases the examinations would be important: but in many cases no chargeability could exist.] Where it exists, notice ought to be given. It is difficult to see how any order of payment can be made on a parish where the party setting the jurisdiction in motion has not been subjected to charge. Under sect. 62 of stat. 8 & 9 Vict. c. 126, the pro-

visions of stat. 11 & 12 Vict. c. 31, are incorporated, so far as they are applicable; *Regina v. Justices of Glamorganshire*, 13 Q. B. 561 (E. C. L. R. vol. 66). That, under stat. 4 & 5 W. 4, c. 76, s. 79, an order of removal may be quashed on appeal for want of a valid and regular notice of chargeability has often been decided; *Regina v. Brixham*, 8 A. & E. 375 (E. C. L. R. vol. 35), *Regina v. Westbury*, 5 Q. B. 500 (E. C. L. R. vol. 48). This answers the objection, that the jurisdiction here is not invalidated by the illegality of the previous steps. As to the fourth objection: the order ought to state the chargeability expressly, that being the basis of the jurisdiction under stat. 8 & 9 Vict. c. 126, s. 48. Under the old rule of law, the complaint itself must state the chargeability, and this must be recited in the order; *Regina v. St. Giles in the Fields*, 7 Q. B. 529 (E. C. L. R. vol. 53): the same law was laid down as to the complaint that the pauper has come to inhabit, in *Regina v. Willats*, 7 Q. B. 516 (E. C. L. R. vol. 53).

Cur. adv. vult.

*361] *Lord CAMPBELL, C. J., in Michaelmas vacation (December 6th), 1850, delivered the judgment of the Court.

In this case the appellants relied on two objections in respect of chargeability.

First, that notice of chargeability had not been sent as is required where a pauper is to be removed. This objection fails, because the regulations relating to orders of removal are not applied to orders for maintenance of lunatics, although the regulations relating to appeals against the former orders are applied to appeals against the latter orders. Now the requirement of a notice of chargeability is a regulation relating to removals, and not to appeals against removals. Also, if such notice were necessary, the statement contained in the examinations, that the pauper was chargeable when sent to the asylum, and had been since supported therein at the expense of the parish, would be sufficient.

The second objection was, that there was no adjudication of chargeability; but, as it is adjudged that the pauper had been, from the time of being sent to the asylum to the time of making the order, maintained at the expense of the parish, this objection fails.

The third objection was, that the medical certificate by the surgeon did not follow the form given in schedule (E) No. 1, of the statute; as that he is not stated to be a member of the Royal College of Surgeons, and his residence is not added; it being contended that the confinement was therefore unlawful, and consequently the order for maintenance made without jurisdiction. But we are of opinion that the confinement did not become unlawful by reason of this irregularity in the form of the medical certificate. The examinations show that all the *362] substantial facts necessary for sending a pauper lunatic *to an asylum existed. It was not contended that the surgeon was

not in fact qualified, or that his residence was not known; and, as he appears by the examinations to be the surgeon of the union to which the appellants parish belongs, the contrary is not to be presumed. The keeper of the asylum ought to have required a certificate, according to the form in schedule (E), before he received the pauper, and incurred responsibility by omitting to do so, under the 51st section; but, after he had received her with the imperfect document, and the confinement had begun, we think it was his duty to continue that confinement till the lunatic should be discharged. In *Shuttleworth's Case*, 9 Q. B. 651 (E. C. L. R. vol. 58), the Court refused to discharge a lunatic, brought up by habeas corpus, on account of defects in the certificate for confinement under stat. 8 & 9 Vict. c. 100, and held the confinement lawful, though the provisions requiring the form of the certificate are the same in both statutes. In *Regina v. Hatfield Peverel*, ante, p. 298, among other objections to an order for maintenance, an alleged defect in a certificate for confinement under stat. 8 & 9 Vict. c. 100, was relied on: but the objection was not sustained. In *Regina v. Guardians of the Carnarvon and Anglesea Union*, ante, p. 357, note (b), an appeal against an order for maintenance, on account of an omission of some of the preliminaries for an order for sending to an asylum under stat. 8 & 9 Vict. c. 126, failed.

As the pauper lunatic was *de facto* confined, and as that confinement was not unlawful, the jurisdiction for adjudicating on the settlement under sect. 58, and for making an order for maintenance under sect. 62, attached, sect. 58 applying to all cases of pauper *lunatics confined or ordered to be confined in an asylum, and sect. 62 [*363 applying in all cases of pauper lunatics sent to an asylum when the settlement shall have been adjudged under sect. 58.

As all the objections fail, the order of Sessions is confirmed.

Order of Sessions confirmed.(a)

(a) See the five preceding cases.

The QUEEN v. The Inhabitants of ST. PANCRAS. Nov. 17.

(ST. PANCRAS v. LAMBETH.)

Reported, 12 Q. B. 31 (E. C. L. R. vol. 64). •

BETTS v. WALKER and Another. Nov. 19.

A plea which refers for explanation to drawings, not traced on the record but annexed to it, is inadmissible; and the Court, on motion (where the pleading related to the specification enrolled by a patentee), ordered such plea to be struck out.

Whether such plea would have been allowable (unless by consent) if the drawings had been traced on the record, *quære*.

In an action for infringing a patent, the defendant, after pleading that the patent was granted on a representation that the invention was an invention of improvements in a specified article, whereas it was not an invention of improvements in such article, and so the patent was void, averred, by another plea, that the supposed invention was not of such use, benefit, and advantage to the public as by law required to make it a consideration for granting a patent, whereby the patent was void. The Court, on motion, struck out the latter plea.

In an action for infringing a patent, if the defendant's notice of objections under stat. 5 & 6 W. 4, c. 83, s. 5 (see stat. 15 & 16 Vict. c. 83, s. 41), is too general to give such information as the plaintiff is entitled to, it is no answer to a motion for better notice that the notice is as specific as the pleas.

WEBSTER, in this term, obtained a rule calling on the defendants to show cause why an order of Lord DENMAN, C. J., of 10th August last, should not be rescinded, and a rule of Court made thereupon (enabling *the defendants to plead certain matters) be discharged. And *364] "why the 4th plea should not be struck out, on the ground that the same is insensible except by reference to certain drawings, which by the rules of pleading cannot be placed on record or replied to, or why the said drawings should not be struck out as surplusage: and why the defendants should not elect between the 4th and 5th pleas, and the other of them be struck out: and why the 8th plea should not be struck out: or why the above-mentioned rule should not be varied or discharged: and why the defendants' attorneys should not deliver to the plaintiff's attorneys or agents a further and better notice of the objections upon which the defendants mean to rely at the trial of this action."

The declaration recited that the plaintiff and Alexander Southwood Stocker were the true and first inventors of the working or making of a certain manner of new manufacture within this realm, to wit, a certain invention of improvements in bottles, jars, pots, and other similar vessels, and in the mode of manufacturing, stoppering, and covering the same, and which said invention others, at the time of the making of the letters patent after mentioned, did not use. The counts then stated the grant of letters patent to plaintiff and Stocker, their executors, &c., and assigns (excuse of profert, the letters patent being lost), with proviso for the patent becoming void if the patentees should not particularly describe and ascertain the nature of their said invention, and in what manner the same was to be performed, by an instrument in writing under their hands and seals or the hand and seal of one of them, and cause the same to be enrolled, &c., within six calendar months next *365] after date of the patent; and it averred that *plaintiff did particularly describe, &c., by an instrument in writing, &c., and cause the same to be enrolled, &c.: and "that there was and still is

annexed to the said instrument in writing so enrolled as aforesaid a certain drawing with certain letters and figures marked thereon." The count then stated an assignment by Stocker of his interest in the patent to the plaintiff(a) by indenture of March 20th, 1845 (excuse of profert, the indenture being lost); and that plaintiff has always used, exercised, &c., the said invention. The count then proceeded to charge the defendants with various acts of infringement.

Pleas. 1. That the Queen did not give and grant to Betts and Stocker the supposed license, &c., in manner and form, &c. 2. That the supposed letters patent have not been lost, in manner, &c. 3. That the supposed indenture in the declaration mentioned has not been lost, in manner, &c. Each of these pleas concluded to the country.

4. "That the said supposed specification in the declaration mentioned was an instrument in writing with certain drawings thereto annexed, and which said specification was in the words, letters, and figures following, that is to say: 'To all,' " &c. The plea then set out the specification, which was of great length, and referred to drawings in the following manner. "We," &c., "do hereby declare the nature of our said invention, and in what manner the same is to be performed, to be particularly described and ascertained in and by the following statement, reference being had to the accompanying drawings, which we declare to belong to and form part thereof. Our said invention relates to *certain improvements," &c. "Drawing, No. 1. The figure 1 represents the upper portion or neck of a bottle of compound construction," &c. There were numerous other references to the drawings, by figures and letters. The claim was, of "the manufacture herein described," &c., as specified, &c., "in this our specification and drawings." The plea, after setting forth the documents, proceeded: "And the defendants further say that the drawings which are by them the defendants now produced and shown to the Court here, and which are hereunto annexed, contain and are true copies of the said drawings annexed to the said specification: Without this, that by an instrument in writing under the hand and seal of the said plaintiff, to wit, a specification, he, the said plaintiff, did particularly describe and ascertain the nature of the said supposed invention in the declaration mentioned, and in what manner the same was to be and might be performed, in manner and form," &c.: conclusion to the country. Drawings, such as accompanied the specification, were annexed to the plea.

5. That the said plaintiff and A. S. Stocker did not within six calendar months, &c., cause any instrument in writing, under the hands and seals of the said plaintiff and A. S. S., or under the hand and seal of either of them, particularly describing and ascertaining the nature of the said supposed invention, and in what manner the same was to be

(a) See *Regina v. Betts*, 15 Q. B. 540 (E. C. L. R. vol. 69).

performed, to be duly enrolled in Her said Majesty's High Court of Chancery: whereby and by reason and means whereof, heretofore and before the commencement of this suit, and also before the committing of the several supposed grievances, &c., or any or either of them or *367] any part thereof, and after the expiration of six calendar *months next and immediately after the date of the said supposed letters patent, to wit, on 1st July, 1845, the said supposed letters patent, license, power, privilege, and authority in the declaration mentioned, and all other rights, &c., granted by the supposed letters patent, utterly ceased, determined, and became void.—Verification.

6. That the supposed specification in the declaration mentioned was an instrument in the words, letters, and figures, and with such drawings thereunto annexed, as in defendant's 4th plea set forth: and that Betts and Stocker were not, at the time of the making of the letters patent, the true and first inventors of the supposed invention in the declaration mentioned; whereby and by reason and means whereof the supposed letters patent, &c., heretofore and before the committing, &c., to wit, on the day of the making of the supposed letters patent, &c., became and were and are null, void, &c. Verification.

7. That the specification was an instrument, &c. (as in plea 6, down to "set forth"): and that, before the making of the supposed letters patent, to wit, &c., Betts and Stocker did represent and suggest to the Queen that the said supposed invention was an invention of improvements in bottles, jars, &c., and in the mode of manufacturing the same; and that the Queen believed such representation and acted thereon, and, so believing and acting, granted the letters patent. Averment, that the supposed invention was not an invention of improvements in bottles, &c., and in the mode, &c., as by Betts and Stocker represented, &c. Whereby, &c.: conclusion as in plea 6.

8. "That the said supposed invention in the declaration mentioned *368] was not, at the said time of the making *of the said supposed letters patent and gift and grant of license, power, privilege, and authority in the declaration mentioned, of such use, benefit, and advantage to the public as by law required to make the same supposed invention a sufficient consideration for the making of the said supposed letters patent and gift and grant of license, power, privilege, and authority. Whereby," &c.: conclusion as in plea 6.

9. That the supposed invention was not, at the said time, &c., a new invention as to the public knowledge thereof within this realm. Whereby, &c.: conclusion as in plea 6.

10. That the specification was an instrument, &c. (commencement as in plea 6, down to "set forth," referring to plea 4): and that the supposed letters patent and gift and grant, &c., in the declaration mentioned were not and was not letters patent and grant of privilege of the sole

working or making of any manner of new manufacture. Whereby, &c.: conclusion as in plea 6. 11. Not Guilty.

The notice of objections was as follows.

"In pursuance of the statute,(a)" &c., "we hereby give you notice of certain objections upon which the defendants mean to rely on the trial of this action: And that, at the same trial, the defendants, besides denying that Her Majesty made such letters patent, gift, and grant of license," &c., as in the declaration mentioned, and also denying that the defendants have or that either of them has committed the supposed grievances, &c., or any or either of them, &c., "will object, contend, and insist: That the said letters patent are *void by [*369 reason of the petition and several suggestions, matters, and things therein recited, or some of them, or the recital thereof contained in the said letters patent, being false and untrue as to or respecting the matters and things stated or mentioned in this notice, or some of them: That the said W. Betts and A. S. Stocker, in the declaration respectively named, did not invent the said supposed invention in the said letters patent and declaration mentioned: That the said W. B. and A. S. S. were not the true and first inventors within this realm of the said supposed invention: That the said supposed invention was not an invention of improvements in bottles, jars, and pots, and other similar vessels, and in the mode of manufacturing, stoppering, and covering the same: That the said supposed invention was not, at the time of the making the said letters patent, of sufficient use, benefit, and advantage to the public: That the said supposed invention was not, at the said time of the making of the said letters patent, of any use, benefit, or advantage to the public: That the said invention was not new as to the public knowledge thereof in this realm at the date of the said letters patent: That the said license, power, privilege, and authority was not a privilege of working or making any manner of manufacture: That the said invention was not an invention of any manner of manufacture: That the said supposed invention was not an invention of any manner of new manufacture: That the plaintiff did not by the said specification in the declaration mentioned particularly describe and ascertain the nature of the said supposed invention, and in what manner the same is to be performed: That the plaintiff and A. S. S. did not by any instrument in writing under their hands and seals, or *under the hand and seal [*370 of either of them, particularly describe and ascertain the nature of the said supposed invention, and in what manner the same is to be performed: That the plaintiff and A. S. S. have not caused the said specification, or any instrument in writing under their hands and seals, or under the hand and seal of either of them, particularly describing and ascertaining the nature," &c. (as above), "to be duly enrolled in Chancery." General conclusion, that defendants will also insist upon

(a) 5 & 6 W. 4, c. 83, s. 5.

such other defences (other than objections to the letters patent) as may be admissible under any of the pleas. Dated 10th August, 1849.

Sir *J. Jervis*, Attorney-General, and *Hindmarch*, now showed cause. —First: as to striking out plea 4. The objection, if available, ought to be taken by demurrer. It has been a constant practice to add drawings to the record where they were necessary. In *Rex v. Arkwright*, Webst. Pat. Ca. 64,(a) a drawing was annexed to the sci. fa.; and the form there was settled by Sir P. ARDEN. Drawings were annexed to the record in *Russell v. Ledsam*, 14 M. & W. 574,†(b) and in *Regina v. Nickels*.(c) In a case relating to abbuttals on a mountain in Wales, a drawing, with the points of the compass marked, was placed in the margin of the record by direction of the late R. V. RICHARDS. If a deed *371] has a plan in the margin, and oyer is craved, *the plan cannot be set out, because it could not be read: but, if enrolment is prayed, the deed is set out with the plan. In *Newton v. Wilmot*, 8 M. & W. 711, 720,† a lease was set out on oyer, containing a demise of premises, with the words “for the better description whereof, a plan is endorsed on the second skin of these presents;” and it was objected that the plea did not set out the plan. PARKE, B., observed: “An indenture set out on oyer is supposed to be read by the clerk of the Court: I do not see how the lines and marks in a plan could be read:” but no decision on that point was required. In *Muntz v. Foster*, 1 Dowl. & L. 737, S. C. 6 Man. & G. 734 (E. C. L. R. vol. 46), the defendants pleaded a plea intended to bring into question the validity of the specification, which the plea set out at length; and the argument for them (on special demurrer to the plea) was that there was a question for the Court, and “the defendants, therefore, have a right to bring the specification before the Court by their plea, and to have the judgment of the Court upon its sufficiency.” “The only point in dispute between the parties might be one which is not a question for the jury at all, and they ought not to be put to the expense of a trial, when they only ask for the opinion of the Court as to the sufficiency of the specification in point of law.” MAULE, J., said there: “I am disposed to think that might be done; but the question is, whether the sufficiency of the specification has been properly raised by the present plea:” and upon that objection the defendant failed, the plea being deemed argumentative for want of a direct traverse. To raise the question correctly for the opinion of the Court, the specification, and all that forms part of it, *372] *must be presented. Since the last cited case it has always been the practice to do this, with a special traverse as in the present instance: and the proper course for the opposite party is to demur.

(a) From a more extended report, published London, 1785. S. C. reported, Dav. Pat. Ca. 61.

(b) Judgment for plaintiff affirmed in Exch. Ch., *Ledsam v. Russell*, 16 M. & W. 633,† and in H. Lords, *Ledsam v. Russell*, 1 H. Lords Cases, 687. See, as to the specification, 14 M. & W. 577,† and *Russell v. Cowley*, 1 Cro. M. & R. 864.†

(c) Mentioned in Webst. Pat. Ca. 627, note (b).

Whether or not the specification as set out describes the invention, is a question for the Court: whether the description is sufficient for the instruction of a workman, is for the jury. In *Regina v. Cutler*, (a) *at Nisi prius, it was objected that part of the alleged invention, [*873 as claimed by the specification, was not the subject of a patent; the drawing annexed to the specification was relied upon in support of the objection; and Lord DENMAN, C. J., ruled that, in the respect pointed out, the specification was bad. There is no other fit mode of traversing the sufficiency of the specification than that which is here adopted. It could not be pleaded that the patentee did not cause a specification to be enrolled. If the objection now taken were valid, the specification itself, which puts a drawing on record, would be a nullity. It is, practically, impossible to dispense with this mode of

(a) 3 Car. & Kir. 215, where the specification and drawings are given.

The specification of a patent is defective if the patentee professes to effect his object in one of two specified modes or else in the other, representing each as available, and it appears by evidence that one of them will effect the purpose, but the other will not.

REGINA v. CUTLER, on scire facias to repeal a patent (see *Cutler v. Bower*, 11 Q. B. 973 (E. C. L. R. vol. 63)), was tried before Lord DENMAN, C. J., at Westminster, in Michaelmas vacation, 1847: verdict for defendant. A rule nisi was obtained for (among other subjects of application) a new trial on the ground of misdirection. Cause was shown in Michaelmas term (November 16th and 17th) 1848, before Lord DENMAN, C. J., COLERIDGE, WIGHTMAN, and ERLE, Js., by *Talfourd*, Serjt., *Whitehurst*, and *Webster*; and *Hindmarch* supported the rule. The Court, without hearing Sir *J. Jervis*, Attorney-General, with whom was *M. D. Hill*, on the same side, stopped the argument, but took time for consideration, Lord DENMAN, C. J., observing: "I think I made a mistake in my direction to the jury: but I should like to look over the short-hand writer's notes. We will tell the Attorney-General afterwards, whether we think it necessary to hear him." In Hilary term (January 30th), 1849,

Lord DENMAN, C. J., delivered judgment as follows.

This was a scire facias to repeal letters patent for improvements in the manufacture of tubular flues to steam boilers.

Several issues were joined on the numerous objections taken to the specification. The 15th was that the specification did not particularly ascertain and describe the nature of the invention. The hammers to be applied to the iron tube are described: and on the faces are to be placed *two stops for dies, or a pair of grooved rolls*. A mandril is then pressed *through the dies, or between grooves of the rolls*. On the trial, there was evidence that the grooved rolls would not do the work here assigned to them; and, in commenting on that part of the case, I told the jury that, if either of those methods were proved to be satisfactory, the patent might be good, notwithstanding the imperfection of the other.

The case of *Lewis v. Marling*, 10 B. & C. 22 (E. C. L. R. vol. 21), had been quoted as establishing that doctrine. But, on examination, the Court there only said that the claim of some part of a machine which turned out to be useless did not vitiate a patent. This is very different from describing a part of a machine as capable of co-operating in the work, when in fact it is incapable, even though he at the same time describes other means which might be effectually employed. For the reader of the specification, relying upon it, might use the former in constructing his machine, which would fail of its purpose from being too accurately made according to the patentee's instructions. The rule must therefore be absolute for a new trial.

The ground of objection which prevailed, and on which the case was distinguished from *Lewis v. Marling*, 10 B. & C. 22 (E. C. L. R. vol. 21), was stated by *Hindmarch* as follows: Here the patentee claims to effect his object in two ways, not pointing out either as the one to be adopted in preference; but one will not effect the object at all. In the case cited, the claim was for an entire machine, part of which proved useless, but the machine might have been worked with or without the part; and it was not described in the specification as essential. See *Morgan v. Seaward*, 2 M. & W. 544, 562.†

description where the machinery is intricate. In indictments for forgery it has long been the practice to give a fac-simile.(a)

Secondly: the defendants should not be required to elect between pleas 4 and 5. Plea 4 raises a question for the Court on the legal effect of the specification. Plea 5 denies that, in point of fact, the instrument described the invention or was enrolled.

*374] *Plea 8 is in a form constantly used of late years. It would not be safe to plead that the invention was of no use; for to such a plea (even if it were otherwise good(b)) any degree of utility, however slight, would be an answer. In *Losh v. Hague*, Webst. Pat. Ca. 202, 204, 5, at Nisi prius, Lord ABINGER said to the jury: "I observe one of the pleas states that the improvements are something trifling and insignificant. If that" (bending instead of welding) "is the improvement, you will consider whether it is worth a patent or not." And the editor says, p. 205, note (b), "This question would appear, both on the authority of the learned Chief Baron in this case, and from the nature of the thing, to be peculiarly a question for the jury; and this defence must consequently be specially pleaded." [COLERIDGE, J.—In that particular case Lord ABINGER could not help putting the question to the jury as he did. WIGHTMAN, J.—In *Morgan v. Seaward*, Webst. Pat. Ca. 170, 172, at Nisi Prius, ALDERSON, B., said: "It is not material, however, that the improvement should be great. It is sufficient if it is an improvement at all."] That there may be something, short of absolute inutility, which vitiates a patent, seems admitted by the judgment of the Court of Exchequer in the last cited case. And Lord COKE says, 3 Inst. 184: "In every such new manufacture that deserves a privilege, there must be *urgens necessitas*, and *evidens utilitas*." At any rate, if the sufficiency of this plea was to be questioned, it should have been done by demurrer.

As to the notice of objections: the practice is that they merely follow the pleas. It was not adverted to *by the framers of stat. 5 & *375] 6 W. 4, c. 83,(c) which requires such notice, that specific pleas would be pleaded: the former course having been to plead the general issue.(d) With special pleas, a specific notice of objections is superfluous. But, if this notice is defective, the plaintiff might have moved for a better particular, as was done in *Heath v. Unwin*, 10 M. & W. 684.†(e)

Webster, contrà.—First: In *Sealy v. Browne*, 14 Law J. N. S. Q. B. (Bail Court) 169, an application was made to strike out pleas to which

(a) See stat. 2 & 3 W. 4, c. 123, s. 3.

(b) See *Morgan v. Seaward*, 2 M. & W. 544, 562, 3.†

(c) See stat. 15 & 16 Vict. c. 83, s. 41, which requires that "particulars" of the objections to be relied upon at the trial shall be delivered with the pleas, and enacts that no evidence shall be given in support of any objection "impeaching the validity of such letters patent," which shall not be contained in the particulars: proviso, that the place where, and manner in which, the invention is alleged to have been used before grant of letters patent shall be stated in the particulars.

(d) See *Leaf v. Topham*, 14 M. & W. 146, 148.†

(e) See *Regina v. Walton*, 2 Q. B. 969 (E. C. L. R. vol. 42).

drawings were annexed; and a rule nisi was granted; but no cause was shown, the parties having come to a compromise. In a note (4), to that case it is said that "In *Barrett v. The Stockton and Darlington Railway Company*," 2 Man. & G. 134, S. C., 2 Scott, N. R. 337, "where a verdict was found for the plaintiff, subject to a special case, with liberty to turn it into a special verdict, it was made part of the terms that a map which had been given in evidence at the trial should form part of the special verdict; but this being found to be impossible, it was agreed that the map should be referred to by either side upon the argument, and no notice was taken of it in the special verdict. An attempt was made in *Panton v. Williams*," 2 Q. B. 169 (E. C. L. R. vol. 42), S. C. 10 Law J. N. S. Exch. 545, "to introduce a fac-simile of certain documents which had been *given in evidence at the trial into a bill of exceptions, but an application for that purpose [*376 was refused, on the ground that the Court had no means of judging whether it was a perfect fac-simile or not. The same rule prevails in criminal pleadings, except in indictments for forgery, where a fac-simile of the document must be set out." This is, in fact, an attempt to plead evidence. [WIGHTMAN, J.—How could an "annexed" drawing be sent up to a Court of Error? *Hindmarch*.—It is constantly done.] That is by consent. According to the ancient practice, pleading was an "oral altercation" of which "a contemporaneous official minute in writing was drawn up by one of the officers of the Court, on a parchment roll, containing a transcript of all the different allegations of fact;" Steph. on Plead. 25 (5th ed.); and "the abandonment of the practice of oral pleading led to no departure from the ancient style of allegation;" p. 29. But no analogy to the ancient style can be preserved when "drawings" are "produced and shown to the Court," and are "annexed" to the pleading. The practice of setting out a fac-simile in an indictment for forgery is peculiar. [WIGHTMAN, J.—If you had to set out a forged instrument in a plea, might not a fac-simile be given?] It would seem not. A scire facias is no precedent for the plea to an action; it is under different rules, and is in the nature of a criminal proceeding. [COLERIDGE, J.—If you succeed on the first point you succeed on the second. And the Court think that the fourth plea must be struck out, on the objection (without entering into any other question on that point) that drawings cannot be "annexed" to a plea.(a)]

*Then, as to plea 8. It is not required, because plea 7 denies [*377 that the invention was "an invention of improvements;" which is, in other words, denying that it was of such utility as would support a patent. The allegation that it was not "of such use, benefit, and advantage to the public" as to be "sufficient consideration" for a patent, raises no question of fact which the plaintiff can deal with. How is it

(a) See *Warshauer's Case*, 1 Moo. C. C. 466.

practicable to weigh the degrees of utility, which may or may not be consideration for a patent? [COLERIDGE, J.—It certainly is a question how a jury could weigh these. WIGHTMAN, J.—It is difficult even for a judge.] Then the effect of the plea is to force a demurrer upon the plaintiff: and a plea framed with that view, and following plea 7, ought not to be allowed.

As to the notice of objection. In *Neilson v. Harford*, 8 M. & W. 806, 822,† PARKE, B., delivering the judgment of the Court of Exchequer, says: "We concur with the opinion of the Court of Common Pleas, in the cases cited by Sir *William Follett*, that the act must be construed to mean that a mere copy of the pleas will not be a sufficient compliance with its provisions. It was passed after the New rules had required the several defences to be pleaded, and must therefore be considered as having intended to give to the plaintiff some additional advantage beyond the information which the record would give him. The statute did not mean to say, nor do we think that the Common Pleas(a) meant to decide, that it would not be sufficient in some cases *378] to give notice in the terms of the plea itself. The objection *may be so completely and so fully expanded on the record, that a mere transcript of the plea itself may be sufficient; in other cases the plea may be so general in its language, as to be insufficient as a notice, if transcribed from the plea merely. Each case must depend on its peculiar circumstances." Stat. 5 & 6 W. 4, c. 83, sects. 5, 6, gives costs to the plaintiff if the defendant fails to prove matters stated in his notice of objections: and the notice ought to be so specific that he may not avail himself of it for the purpose of objection and yet escape costs if the plaintiff succeeds. In *Leaf v. Topham*, 14 M. & W. 146,† notice of objections, adding nothing material to the language of the pleas, was held insufficient. Here the pleas, from 6, onwards, are too general to convey any information; and the notice does not explain them. It is not shown whether the novelty of the invention is disputed as to the whole or any part. The plaintiff must go to trial with evidence as to the whole. If the objection were specific he might perhaps disclaim.

COLERIDGE.—We have already said that the 4th plea is not maintainable. I think also that the 8th plea is pleaded only to invite a demurrer, and must be struck out. And I am of opinion that the notice is not specific enough. If the pleas are so expressed as to give the requisite information, the notice of objections may not be so material; but here that is not the case: the pleas are quite general; and the notice of objections is as much so.

WIGHTMAN and ERLE, Js., concurred.

*379] *Hindmarch* then prayed leave to amend the notice. [COLERIDGE, J.—You must go to a Judge at chambers, and show the

(a) *Fisher v. Dewick*, 4 New Ca. 706.

particular amendment you desire to make.] *Hindmarch* also suggested that the objection originally taken to plea 4, and which the defendants had been prepared to meet, was that the drawings could not be put upon the record, whereas the Court had decided merely that they could not be annexed. [WIGHTMAN, J.—I think they embarrass the record very considerably, and are unnecessary. COLERIDGE, J.—They may be placed there by consent.]

Webster asked if the 4th plea was to be struck out, or the drawings only. [COLERIDGE, J.—The plea. It is bad in that form.]

Rule. That the rule of the 11th August be varied; and that the 4th and 8th pleas be struck out; and that the defendants deliver to the plaintiff's attorneys or agents a further and better notice of the objections upon which the defendants mean to rely at the trial of this action.(a)

(a) See the rulings as to particulars of objection collected in Norman's Treatise on the Law and Practice relating to Letters Patent for Inventions, pp. 169–174, London, 1853.

To warrant a patent the invention must be useful, that is, capable of some beneficial use—not pernicious or frivolous or worthless: *Dickinson v. Hall*, 14 Pick. 217. A patented invention is deemed useful, if it is not frivolous. The want of utility is good cause for not granting the patent, but not for setting it aside: *Whitney v. Emmett*, *Baldw.* 303; *Lowell v. Lewis*, 1 Mason, 182; *Case v. Morey*, 1 New Hamp. 347. An invention, in order to be useful, need not supersede or be more useful than all other inventions for the same purpose. It

is sufficient that it may be applied to practicable purposes with some degree of beneficial use; that it has no pernicious, immoral, or mischievous tendency; and so far as it is applied, is salutary: *Dunbar v. Marden*, 13 New Hamp. 311.

An invention of an ornamental mode of putting up thread, which gave it no additional value, but merely made it sell more readily at retail and for a larger price, is not a useful invention within the meaning of the patent law: *Langdon v. De Groot*, *Paine*, 203.

*WEBSTER FLOCKTON and Five Others v. HALL and Five Others. Nov. 20. [*380

To a declaration in case, for infringing a patent, defendants pleaded, in bar of further maintenance of the action, that, after declaration, it had been agreed between plaintiffs and defendants that defendants should admit their liability to the action, as they then did admit; that defendants should take, and plaintiffs grant, a license for the use of the invention; that defendants should hand a check for 75*l.* to a third person, to be held till the grant of the license, and then handed by him to plaintiffs; that plaintiffs and defendants should respectively bear their own costs of the action; that "this action, and the causes of action included in the same should be settled, satisfied, discharged, and terminated by the arrangement and agreement before mentioned." Averment that defendants admitted their liability, drew and delivered the check, and had always been ready to perform the agreement, take the license, and pay their own costs; of which plaintiffs had notice.

Held bad, on special demurrer.

For that, if the agreement were construed as an accord in respect of the things to be done, there was no averment of satisfaction, the stipulations of defendants not having been all performed; and, if the making of the agreement itself was relied upon there was no allegation, expressed or implied, that the agreement was accepted in satisfaction.

Also, because the plea left it ambiguous which of the two matters above specified was relied upon as the accord and satisfaction.

CASE for infringement of a patent, one of the plaintiffs being patentee

of the invention, and the other five his assignees of five undivided sixth parts. Plea: That plaintiffs ought not further to maintain their action; because defendants say that, after the plaintiffs had sued out their writ of summons and declared thereupon in this suit, and before this day, to wit, on 11th May, 1848, it was agreed, between the plaintiff Flockton and the defendants, that the said defendants should admit (and as they then did admit) their liability to this action; and, further, that a license should be taken by defendants from plaintiffs, and which plaintiffs were to grant to defendants, for the use of the invention in the declaration mentioned; and that defendants should draw a check upon *381] their, defendants', bankers, to wit, &c., *for 75*l.*, payable to the bearer, and deliver the same to one Charles Biggs, to be held by him until the license should be granted, and to be then delivered over by him to plaintiffs; and further, that plaintiffs and defendants should respectively bear and pay their own respective costs incurred in this action; "and that this action, and the causes of action included in the same, should be settled, satisfied, discharged, and terminated by the arrangement and agreement before mentioned." And defendants further say that thereupon, and within a reasonable time in that behalf, and on the faith of the said agreement, and before this day, to wit, on, &c., defendants did admit their liability as aforesaid, and did draw and deliver to the said Charles Biggs a check on their bankers, to wit, &c., for 75*l.*, payable to the bearer, according to the said agreement, and upon the terms thereof as aforesaid; and the same was then received, and thence hitherto hath been and still is held, by the said Charles Biggs upon the terms aforesaid: and defendants "have always, from the time of the making of the said agreement and arrangement hitherto, been ready and willing to perform and fulfil the said agreement in all things on their part to be performed and fulfilled, and to take the said license to be granted to them by the said plaintiffs, and to bear and pay their own costs incurred in this action; and whereof the plaintiffs have always hitherto had notice." Verification.

Special demurrer, assigning for causes (so far as is material to the points decided): That the accord is not sufficiently certain: That the plea is in effect a plea of accord without satisfaction; for that the *382] alleged agreement itself could not operate as a satisfaction, *there being no allegation in the plea that the alleged agreement was accepted by the plaintiffs in full satisfaction; neither could the admission of a liability, which did not advance the plaintiffs' right or remedy: That the delivery of a check to Charles Biggs was a mere part performance of the accord, which is not sufficient; that it should have been shown by positive allegation that the accord had been executed in whole before the pleading of the plea: That non constat that it ever will be performed, in which case, if the plea were held to be a bar to the action, the defendants would receive back their check, and

the plaintiffs would have nothing in satisfaction of their admitted right of action: That, if the plea be intended as a plea not in bar, but in suspension of the right of action, it is bad on that account; for it must be a final bar or nothing: That the plea confesses the cause of action, and does not sufficiently or at all avoid it: and that it wants certainty and particularity as to time. Joinder in demurrer.

Montagu Smith, for the plaintiffs.—If this plea is to be understood as setting up the performance of the acts agreed to be done, as an answer to the action, it is bad, because it does not show that all the acts have been done: and therefore it is a plea of accord without satisfaction. The averment of readiness and willingness to perform what was not performed is insufficient; *Carter v. Wormald*, 1 Exch. 81,† *Com. Dig. Accord* (B 4), *Bayley v. Homan*, 3 New Ca. 915; so far, there is only one right of action substituted for another; and that is no bar. Matter which merely suspends the action is *not pleadable in bar; *Harris v. Reynolds*, 7 Q. B. 71 (E. C. L. R. vol. [*383 53]).(a) But, if the plea sets up the agreement itself as an answer, then there is no satisfaction, because it is not shown that the agreement was accepted in satisfaction. If it had been so accepted, that would have constituted accord and satisfaction; but the acceptance must appear; *Evans v. Powis*, 1 Exch. 601, 607.† The proper mode of pleading an acceptance in satisfaction appears in *Jones v. Sawkins*, 5 Com. B. 142 (E. C. L. R. vol. 57). Had the acceptance of the agreement been so pleaded here, the plaintiff might have traversed either the agreement or the acceptance; *Bainbridge v. Lax*, 9 Q. B. 819 (E. C. L. R. vol. 58). Further, the plea is so vague and uncertain that it is bad on general demurrer. It is doubtful whether the words, “that this action, and the causes of action included in the same, should be settled, satisfied, discharged, and terminated by the arrangement and agreement before mentioned,” be an averment in the plea or part of the agreement itself. Nor does it appear whether the “arrangement” be the making the agreement or performing its stipulations. Again, if the words be an averment, the defence, being pleaded after action brought, is insufficient, the discharge not being made applicable to the costs. Again, no time is mentioned within which the license is to be granted and the acts are to be done; so that there is no certainty, which there ought to be in an accord; *Com. Dig. Accord* (B 3).

Bovill, contra.—This plea is not by way of accord and satisfaction, strictly so termed. Were the *technical rules as to accord and satisfaction applied to such a defence as this, great injustice [*384 would ensue, inasmuch as the contract between the parties would become ineffectual if a single shilling remained unpaid. The agreement clearly contemplates that each party is to pay his own costs: therefore

(a) See *Ford v. Beech*, 11 Q. B. 852 (E. C. L. R. vol. 63); *Webb v. Spicer*, 13 Q. B. 886, 898 (E. C. L. R. vol. 66).

the objection as to the omission of any stipulation in respect of costs fails. The meaning of the technical rule, that accord without satisfaction is bad, has been sometimes lost sight of. The reason given for it is that the mere accord gives no remedy. And that will be sound, where the accord is unilateral, and nothing appears but the consent of the plaintiff to accept something in satisfaction of the suit. Thus, in *Com. Dig. Accord* (B 4), it is said: "an accord must be executed, otherwise there will be no remedy for a non-performance." And, in the same section, it is said: "an accord, with mutual promises to perform, is good, though the thing be not performed at the time of action; for the party has a remedy to compel the performance." Therefore the rule is inapplicable to a case like the present, where there is a mutuality by reason of the agreement. Accordingly in *Case v. Barber*, T. Raym. 450, it was laid down that, as soon as it had been decided that an action might be maintained on mutual promises, an agreement with mutual promises might satisfy a claim, although there were no execution of the agreement. That principle was acted upon in *Good v. Cheesman*, 2 B. & Ad. 328 (E. C. L. R. vol. 22), where an agreement, which had not been performed, but was capable of being immediately enforced, was held to raise a good defence, though, as *LITTLEDALE, J.*, there said, it *385] was "not strictly an accord and satisfaction or a release." It is true that there the rights of third parties were involved: but that circumstance operated only by creating a valid consideration, in the absence of which the plaintiff could not have been bound by an undertaking to accept less than his whole debt. Here the agreement, by its mutuality, contains such a consideration. These authorities are recognised in *Evans v. Powis*, 1 Exch. 607,† where the defence failed for want of the requisites which this plea satisfies. The plea there merely set up an accord; and the authorities cited on the other side show only that, where a plea sets up a naked accord, as such, without satisfaction, it is bad. That the damages are unliquidated is not material: it was not the less competent to plaintiff and defendant to agree, for good consideration, to put an end to the litigation. It is not pretended that the agreement, taken by itself, is bad for want of consideration. It is objected that the plea does not show that the agreement was accepted in satisfaction: but the agreement, which the plea states, contains in itself such an acceptance. The terms of the agreement cannot be impeached for informality, even on special demurrer: but in substance and form the agreement contains a renunciation of the plaintiff's right of action in consideration of the defendant's contract.

Montagu Smith, in reply.—It appears to be conceded that the statement of readiness and willingness to perform is not tantamount to an allegation of performance. The plea is supported, not as showing *386] accord and *satisfaction, but as raising a bar by showing a new agreement. For that there is no precedent. It is true that, as

is contended on the other side, such an agreement may be an answer to the action: but that is only where it appears to have been accepted in satisfaction. Even if in the body of the agreement there had been a clause to the effect that the agreement should be accepted in satisfaction, there must still have been an averment, by the plea, that the agreement containing this clause was accepted in satisfaction. *Gifford v. Whittaker*, 6 Q. B. 249 (E. C. L. R. vol. 51), may be added to the authorities on the requisites of a plea of accord and satisfaction. (He was then stopped by the Court.)

COLERIDGE, J.(a)—I feel averse to the introduction of novelties, especially into pleas of this nature, which are common. It is allowed, indeed it could not be disputed, that a plea of accord without satisfaction is bad. Now, there may be two kinds of accord: the making of the agreement itself may be what is stipulated for, or the doing the things mentioned in the agreement. In the latter case the plea, as is admitted, ought to aver that the things have been done, and the agreement, without that, affords no answer. Where the making of this agreement is itself the thing looked to, the plea must aver that it has been accepted in satisfaction; that averment, in truth, carries with it the fact of performance of all that was to be done in order to settle the action: it leaves nothing *in fieri*, nothing incomplete. There can be no question but that, if the agreement here had been to do a *col- [387 lateral act, as to give a horse or build a house, and the execution of the agreement were itself relied upon, the plea must have averred that the agreement was accepted in satisfaction; or else there must have been an averment that the thing agreed upon had been done. In this case, therefore, the only question is whether the acceptance of the agreement in satisfaction is involved in the agreement itself. Now, as to that, I think we cannot look into the agreement itself for the purpose of collecting from it the additional fact that it has been accepted in satisfaction: the acceptance must be shown independently. But, in addition to this, I think the plea is bad in two respects. First: it is left uncertain what the plea relies on, whether upon the acts which are the subject-matter of the agreement or upon the agreement itself. Secondly: as Mr. *Smith* pointed out, it is not clear what the plaintiff has to traverse: whether the performance of all that was stipulated for, or the intention of the parties to make the mere agreement the consideration for settling the action.

ERLE, J.—I think this is a bad plea. I take the law to be, that an agreement may be accepted in satisfaction of an existing cause of action. If the agreement itself expressed that it, the agreement, was to be accepted as satisfaction, the averment that it was so accepted might be unnecessary. I thought that the agreement did so express in this case: but, upon looking at the plea, I see that is not so: the plea states only,

(a) PATTERSON and WIGHTMAN, Js., were absent.

first, that certain things agreed are to be done, and, secondly, that the action and causes of action are to be satisfied by the arrangement and *388] agreement before *mentioned. That leaves us quite at a loss whether there is an agreement besides the agreement that the things should be done: it rather seems that there were two agreements.

Judgment for plaintiffs.

See *Hawley v. Foote*, 19 Wend. 516; *Douglas v. White*, 3 Barb. Ch. Rep. 621; *Logan v. Dinmore*, 5 N. Hamp. 136; *Russell v. Lytle*, 6 Austin, 1 Stewart. 476; *Boyd v. Hitchcock*, 20 Wend. 390; *Bullen v. M'Gillicuddy*, 2 Dana, Johns. 76; *Le Page v. M'Crea*, 1 Wend. 164; 92.

In the Matter of HUMPHREYS. Nov. 22.

An attorney of the Court of Great Sessions in Wales, who was in actual practice at the passing of stat. 11 G. 4 & 1 W. 4, c. 70, and who, under stat. 55 G. 3, c. 184, Schedule, part 1, has paid for his admission a stamp duty of 25*l.*, but paid only 60*l.* on his articles of clerkship, and who has, under stat. 11 G. 4 & 1 W. 4, c. 70, s. 16, and before the passing of stat. 6 & 7 Vict. c. 73, been admitted on the shilling roll, but has not been admitted in the superior Courts of Westminster under sect. 17 of the first-mentioned statute, is, under stat. 6 & 7 Vict. c. 73, s. 35, guilty of a contempt if he practise in a Superior Court of Westminster in a cause where the defendant did not reside in Wales or Cheshire at the commencement of the suit:

Although the irregular act is not shown to have been done knowingly or wilfully.

WILLES, in last Trinity term, obtained a rule calling upon Richard Humphreys to show cause why an attachment should not issue against him for his contempt of this Court in having knowingly and wilfully acted and practised in this Court as an attorney for the plaintiff in a cause of Edwards and another against Williams, without being duly qualified or authorized by law to act or practise as such attorney, contrary to stat. 6 & 7 Vict. c. 73, s. 35; and also that he, being an attorney of this Court, pursuant to stat. 11 G. 4 & 1 W. 4, c. 70, and not having paid the difference of duty pursuant to sect. 17 of that statute, did knowingly and wilfully act and practise as an attorney for the plaintiff in the said cause, when the defendant, at the time of the commencement of the suit, did not reside within the county palatine of Chester or the principality of Wales.

From the affidavits in support of the rule it appeared that Humphreys, *389] at the time of the passing of stat. 11 G. 4 & 1 W. 4, c. 70, was an attorney of the Great Sessions Court of Wales, in actual practice. He had paid only 60*l.* stamp duty on his articles of clerkship, under stat. 55 G. 3, c. 184, Schedule, Part I., *Articles of Clerkship*. His name had, on 1st December, 1830, been placed on the shilling roll under stat. 11 G. 4 & 1 W. 4, c. 70, s. 16. He had not been otherwise admitted an attorney of the Superior Courts of Westminster. The alleged contempt consisted in his having conducted the action named in

the rule, which was an action brought in this Court, in February, 1847, against a defendant not residing in Cheshire or Wales at the time of the commencement of the suit. The proceedings in London were conducted by Humphreys's London agents: but the cause was tried in Flintshire, when a verdict was found for the plaintiff, who recovered judgment. Humphreys was the attorney on the record, and conducted all the proceedings in Wales; and the taxed costs of the whole proceedings were paid to his London agents, as such agents, by the defendant. Affidavits were made as to defendant's belief that Humphreys, in so practising, had wilfully and knowingly acted in contempt of this Court.

From an affidavit in answer it appeared that Humphreys, on his admission as attorney of the Court of Great Sessions, paid a stamp duty of 25*l.* (stat. 55 G. 3, c. 184, Schedule, Part I. *Admission*): That the Commissioners of Inland Revenue had intimated an intention to proceed against Humphreys for a penalty of 100*l.* under stat. 34 G. 3, c. 14, s. 4; but that, on explanation of the circumstances, they had informed him that they should not do so: And that his London agents were attorneys of this Court.

**Martin and Pulling* now showed cause.—The attachment will not go unless there appear wilful misconduct, *Rex v. Borron*, 3 [*390 B. & Ald. 432 (E. C. L. R. vol. 5); nor where the contempt is not apparent; Com. Dig. *Attachment* (A 3). But, further, Humphreys was entitled to practise as he has done. Stat. 2 G. 2, c. 23, s. 10, enabled any attorney of the Great Sessions to practise in the courts of record at Westminster, by leave and in the name of an attorney of such courts. Stat. 34 G. 3, c. 14, s. 4, subjected a person for practising, without having been admitted, to a penalty of 100*l.*, but did not prohibit the practice, nor repeal the previous Act. And here the Commissioners of Inland Revenue have declined proceeding for the penalty; this Court, therefore, will not interfere by process of contempt; *Matthews v. Royle*, 6 B. Moore, 70. Sect. 35 of stat. 6 & 7 Vict. c. 73, under which this application is made, constitutes it a contempt of Court if any person sue out a process "without being admitted and enrolled as aforesaid." But Humphreys has been enrolled under stat. 11 G. 4 & 1 W. 4, c. 70, s. 16, and has actually practised, so as to be free from the objection taken in *Ex parte Read*, 1 B. & Ad. 957 (E. C. L. R. vol. 20). He might practise in any Court in the name of his agent, if an attorney of such Court; *Hulls v. Lea*, 10 Q. B. 940 (E. C. L. R. vol. 59). He may also be now admitted an attorney of this Court without further payment, under sect. 17 of stat. 11 G. 4 & 1 W. 4, c. 70, inasmuch as he has paid the "full duty," 25*l.*, "required upon admission of attorneys" in the Superior Courts of Westminster. He has not indeed paid the full duty upon articles of clerkship *in order to his admission in such Courts: but that the statute does not require in [*391

terms, nor will the Act be strained for the purpose of imposing a duty; *Tomkins v. Ashby*, 6 B. & C. 541 (E. C. L. R. vol. 13); 2 *Dwarris on Statutes*, 646 (2d ed.); *Middleton v. Chambers*, 1 M. & G. 97 (E. C. L. R. vol. 39). Here such a construction would be peculiarly harsh. An attorney on the shilling roll would be disabled from practising in bankruptcy, in criminal cases, or in inferior Courts; for stat. 6 & 7 Vict. c. 73, s. 35, applies to "any proceedings in any Court of law or equity." Suppose an attorney, so circumstanced, had, before the actual commencement of an action, given an undertaking to appear for a defendant residing in Wales, under sect. 16 of stat. 11 G. 4 & 1 W. 4, c. 70, and, before the writ were sued out, the party ceased so to reside: the attorney, according to the construction insisted on by the other side, would be liable to an attachment whether he did or did not appear. The intention of the consolidating Act, 6 & 7 Vict. c. 73, was to place all attorneys then actually on the roll upon the same footing.

Sir *J. Jervis*, Attorney-General, *Welsby*, and *Willes*, contra.—By stat. 6 & 7 Vict. c. 73, First Schedule, Second part, the whole of stat. 11 G. 4 & 1 W. 4, c. 70, is preserved. Sect. 16 of the statute last mentioned enables attorneys on the shilling roll, as to the Superior Courts at Westminster, to practise in cases only where the defendant, at the time of the commencement of the action, resides in Wales or Cheshire, which was not the case in this action. Therefore, under sect. 35 of stat. 6 & 7 Vict. c. 73, Humphreys is guilty of a *392] *contempt. An admission under sect. 17 of stat. 11 G. 4 & 1 W. 4, c. 70, would, no doubt, have been an answer to this application; but there has been no such admission; and he has not paid the 60*l.* which, if admitted under sect. 17, he would have had to pay: for "the full duty required upon admission of attorneys in the said Courts at Westminster," in that section, manifestly includes both the heads in Part I. of the Schedule to stat. 55 G. 3, c. 184, which have been mentioned: namely, "Admission of any person to act as an attorney," and "Articles of clerkship, or contract, whereby any person shall first become bound to serve as a clerk; *in order to his admission as an attorney or solicitor, in any of His Majesty's Courts at Westminster.*" Sect. 17 of stat. 11 W. 4 & 1 Vict. c. 70, gave a considerable boon to the attorneys of the Great Sessions, who previously, under stat. 9 G. 4, c. 49, s. 4, in order to become capable of being admitted attorneys of the Superior Courts at Westminster, had to pay the whole of 120*l.* instead of the difference between the 120*l.* and the 60*l.*; *Re Myers*, 8 Q. B. 515 (E. C. L. R. vol. 55). No argument arises from the Commissioners of Inland Revenue having declined to proceed for the penalty under stat. 34 G. 3, c. 14, s. 4; for, that enactment being repealed, the proper remedy now is attachment for contempt. The only question is as to the terms on which the attachment is to be satisfied: the Court will probably require that the sum which the party has obtained in the

character of an attorney should be refunded. It appears, from what was said in *Reader v. Bloom*, 10 B. Moore, 261,^(a) that, if the plaintiff in *this action had been aware of the want of qualification, he might have resisted the payment of the entire costs to Humphreys. [*393

PATTERSON, J.—The 16th and 17th sections of stat. 11 G. 4 & 1 W. 4, c. 70, have very different objects. The 16th section was necessary, because, before that act was passed, persons were admitted to practise at the Great Sessions, having served under articles on which a duty of 60*l.* was payable, whereas the duty in England was 120*l.*, and on payment of 25*l.* duty on admission, which applied to both cases. That practice of the Welsh attorneys was limited to cases within the jurisdiction of the Great Sessions. When the Great Sessions were abolished, and it became necessary to sue out process in the Courts of Westminster, though the case would previously have been within the jurisdiction of the Great Sessions, it would have been hard if a Welsh attorney had not been allowed to practise in causes in which, before the Act, he might have practised as an attorney of the Court of Great Sessions. Therefore the 16th section has the effect of allowing a Welsh attorney to enable himself to practise in such causes upon payment of 1*s.*, by entering himself on the roll to be provided for that purpose. In that enactment the word “admitted” does not occur: it provides for the attorney being enabled, on enrolment, to practise in causes where the defendant resides in Wales. Then the 17th section further provides that the attorney, if he pleases, may come and be admitted to practise as an attorney of the Courts at Westminster on the payment of an additional duty. What that additional duty is, it is *not [*394 now necessary to determine. To avail himself of this section, he clearly must be admitted. Now the party here has availed himself of sect. 16, but not of sect. 17: he is on the roll specially provided for Welsh attorneys; but he has not been admitted an attorney of this Court or of any Court at Westminster. Then we are to consider the effect of stat. 6 & 7 Vict. c. 73, s. 35. That enacts that, “in case any person shall in his own name or in the name of any other person sue out any writ or process, or commence, prosecute, or defend any action or suit or any proceedings in any Court of law or equity, without being admitted and enrolled as aforesaid, or being himself the plaintiff or defendant in such proceedings respectively, every such person shall and is hereby made incapable to maintain or prosecute any action or suit in any Court of law or equity for any fee, reward, or disbursements on account of prosecuting, carrying on, or defending any such action, suit, or proceeding, or otherwise in relation thereto; and such offence shall be deemed a contempt of the Court in which such action, suit, or proceeding shall have been prosecuted, carried on, or defended, and shall

(a) S. C., rather differently reported, 3 Bing. 9 (R. C. L. R. vol. 11).

and may be punished accordingly." Then, as the party here has not been admitted at all, the case is within the very words of the section. Whatever question may arise as to the terms on which a Welsh attorney may be admitted, yet here, as in fact he never has been admitted at all, he is in the same condition (excepting as to causes where the defendant lives in Wales) as a person who has never served under articles. As to parties so situated, the enactment is that the practice shall be a contempt of the Court where the practice is. In *these affidavits, *395] and I think in the rule, the words "knowingly and wilfully" are inserted. If it were necessary to support that charge, we might feel much doubt whether it was sustained. But here we cannot avoid seeing that the party has incurred a contempt. The Attorney-General says that the imposition of a penalty by stat. 34 G. 3, c. 14, s. 4, has been repealed. But the whole of that Act is preserved by stat. 6 & 7 Vict. c. 73, Second part of schedule First: (a) and therefore possibly the party may still be liable to a penalty. But we cannot say that there has not been a contempt. I fear, therefore, that this gentleman has brought himself within the Act, and that we cannot avoid making this rule absolute. It ought to lie in the Master's office till the fifth day of next term: and, upon his paying the costs of this application, and getting himself admitted before that day, the attachment will not be enforced.

COLERIDGE and WIGHTMAN, Js., concurred. (b)

Rule absolute, on the above terms. (c)

(a) It is repealed, as to a part not material to the question discussed in the text, by stat. 7 & 8 Vict. c. 36, s. 3.

(b) ERLE, J., was absent.

(c) Afterwards in the Bail Court, PATTESON, J., refused a rule to admit Humphreys an attorney of this Court without payment of 60*l.*, the difference between the two stamp duties on the articles of clerkship; In re Humphreys, 7 Dowl. & L. 344.

*396] *The QUEEN v. THEOPHILUS HASTINGS INGHAM and JOHN ROBERT TENNANT, Esquires, Justices of the WEST RIDING of YORKSHIRE. Nov. 24.

When an information is laid before justices of the peace for an indictable misdemeanor, it is in the discretion of the justices to hear it, or refuse to hear and leave the complaining party to originate his prosecution before a grand jury.

The Court, therefore, refused to compel justices by mandamus to hear evidence on an information (with a view to prosecution by indictment) for an alleged perjury in depositions before the Ecclesiastical Courts, when it appeared that the suit in which the depositions had been made was still depending, and that the justices had therefore held it improper to proceed on the information.

A RULE was obtained in last Trinity term, calling upon the above-named magistrates to show cause why a mandamus should not issue requiring them to hear evidence on an information against Margaret

Brown for perjury, and to adjudicate upon such information. It appeared on affidavit that the perjury was alleged to have been committed in giving evidence before the Prerogative Court of York in a suit (between William Preston Baldwin and The Rev. Richard Milner and John Brown) touching the validity of the will and codicil of John Baldwin deceased. The accused party was brought before the justices on May 28th, 1849, by warrant; and the prosecutor also attended, and proved the words constituting the alleged perjury, by the evidence of Joseph Buckle, Esq., the Examiner and Deputy Registrar of the Prerogative Court. One of the magistrates then asked Mr. Buckle in what stage the proceedings in the Ecclesiastical Court were, and whether M. Brown would be wanted to give evidence there again. Mr. Buckle answered that the suit would have proceeded to sentence if W. P. Baldwin had not excepted to the credit of M. Brown; and that he did not see how her evidence could be required again. In answer to another question, Mr. Buckle said it was impossible to tell how long the proceedings in the *Ecclesiastical Court might last, and that they had already occupied [397 about two years. Mr. Ingham then observed that it seemed a delicate thing for the justices to interfere in a matter pending, and on which another Court would have to pronounce; and both justices asked the prosecutor's attorney if he could cite any case to warrant their proceeding under such circumstances. The attorney was not aware of any case, but urged that the justices should nevertheless deal with the prosecution, and hear the remaining witnesses (several being in attendance) in support of the charge. The justices, however, declined to interfere, unless warranted in doing so by a mandamus; and Margaret Brown was discharged. Stat. 11 & 12 Vict. c. 42, s. 17, was relied upon in support of the motion.

The magistrates, in their affidavit in answer, stated the communications made to them by Buckle after giving evidence of the words as above stated: namely: that, after Margaret Brown had been examined by him on interrogatories, and had made her statements above mentioned, relating to the validity of Baldwin's will, and to her attestation of it, and after the said statements had been made and become evidence in the suit, and during the pendency thereof in the Ecclesiastical Court, viz. on 11th May, 1849, "certain exceptive allegations were made in the said Court on the part and behalf of the said W. P. Baldwin in the said suit, in and by which it was alleged and stated, on the part and behalf of the said W. P. B., that the said several statement and allegations of the said M. Brown in the said Court in answer to the said interrogatories in the said suit in the said Court were wholly false and untrue; and that it had then and there become, and still was, a *matter for the determination of the said Ecclesiastical and Prerogative Court in the said suit, whether the said several state- [398

ments and allegations of the said M. Brown in the said Court in answer to the said interrogatories in the said suit in that Court were true or false." All which statement and information of Mr. Buckle the deponents (the two justices) believed to be true. And they further deposed that, the said suit being so then pending in the Ecclesiastical Court, "and the said credibility of the said M. Brown and the truth of her said statements and allegations in her said answers to her said interrogatories then being matters proper and necessary for the consideration and determination of the said Ecclesiastical and Prerogative Court in the said suit, as they the said deponents were then informed and verily believed, they the said deponents and each of them then and there considered and believed that it was not their duty, or the duty of either of them, to express any opinion as to the credibility of the said M. B., or as to the truth of her said allegations and statements in answer to the said interrogatories in the said suit, or to proceed upon the said information charging the said M. Brown with wilful and corrupt perjury in making the said allegations," &c., "in answer," &c., "while and so long as the said suit, in which the truth or falsehood of such allegations or statements and the credibility of the said M. Brown were to be determined by the said last-mentioned Court, was still pending and undetermined; and that it would then and there have been contrary to public policy, and prejudicial to the due and fair administration of justice in the said suit in the said Ecclesiastical and Prerogative Court at York, if they," the *399] deponents, *had proceeded to adjudicate upon the matter of the said information; as each of the deponents did then and still doth believe. "And these deponents further say, that they have been informed and verily do believe that the said suit" "is still pending and undetermined, and that the credibility of the said M. Brown, and the truth or falsehood of the said several allegations of the said M. Brown in the said Ecclesiastical and Prerogative Court at York, in answer to the interrogatories in the said suit, still remain matters for the consideration and determination of the said Ecclesiastical and Prerogative Court in the said suit." They added that they had no other ground or reason for not proceeding than those above stated.

Overend now showed cause.—The magistrates had a right to exercise discretion as to hearing or refusing to hear, and have acted properly, the cause in the Ecclesiastical Court being still undecided. In *Rex v. Ashburn*, 8 Car. & P. 50 (E. C. L. R. vol. 34), at the Central Criminal Court, it was stated to have been the practice of the late Recorder of London "never to try a case of perjury while the cause out of which it arose was in any way undermined;" and *PARKE, B.*, acted upon that rule. But, further, justices of the peace have not jurisdiction to try or commit for trial on a charge of perjury at common law. *WIGHTMAN, J.*, clearly inclined to that opinion, though the point was not decided,

in *Regina v. Bartlett*, 1 Dowl. & L. 95.(a) *Overend* was then stopped by the Court, and

**Pashley* was called upon as to the first point.—In *Rex v. Ashburn* the trial was postponed, “on the understanding that [*400 the rule for a new trial of the civil action should be peremptorily argued in the ensuing term:” but it appears by a note (p. 51, note (b)), that *LITLEDALR, J.*, afterwards enlarged the rule for a new trial, “in order that the indictments might be tried before it should come on for argument.” The magistrates are claiming a discretion not even to hear. The ground of public policy which they allege is at least questionable. It was not recognised in *Earl Verney v. Macnamara*, 1 Bro. Ch. Ca. 419, where, on motion to amend a schedule to an answer in Chancery on which an indictment for perjury had been preferred, or threatened, Lord THURLOW refused to interfere, saying that, although he himself did not think the defendant intended to perjure himself, the matter was fit to be decided upon by the Grand Jury. That case was acted upon in *Stratford v. Greene*, 1 Ball & B. 294, when Lord MANNERS varied an order made by the Master of the Rolls, who had refused to take an answer off the file in order that the plaintiff in the suit might prefer an indictment for perjury upon it: and his Lordship held that the prosecutor was entitled to this, *ex debito justitiæ*. When the present rule was moved for (b) Lord DENMAN, C. J., said it seemed very desirable that the prosecutor, in all cases where an indictment was to be preferred, should go before justices. If the prosecution here is delayed while the suit in the Ecclesiastical Court is depending, the indictment may be postponed till it is too late to prefer it. *Pashley* *then [*401 cited *Ayliffe*, *Parerg.* 254, 255, and 1 *Oughton*, *Ord. Jud.* 156, et seq. tit. xcix., &c., as showing how, after exception to a witness, proceedings in the suit might be protracted.

COLERIDGE, J.(c)—This rule must be discharged. The question is whether, when we see that the justices have exercised their discretion honestly in refusing to hear the information further, we should say that we think them wrong, and compel them to go on. I think there is abundant reason here for saying that the course they took is the most likely to answer the ends of justice. A suit is depending; and evidence has been given by a witness. Shall a party, perhaps interested in the result, come in, stop the mouth of that witness, and perhaps unavoidably prejudice the Judge, by requiring a magistrate to hear and act upon an information for perjury? The argument in support of the rule goes too far; for the objects which, according to that reasoning, it is necessary to enforce would not be accomplished unless we could direct

(a) *Overend* here mentioned stat. 11 & 12 Vict. c. 42, s. 1 (Royal Assent, 14th August, 1848). See Mr. Archbold's note to *Jervis's Acts*, pp. 7, 8 (3d ed.). And, as to trial for perjury, stat. 4 & 5 W. 4, c. 36, s. 17, and 5 & 6 Vict. c. 38, s. 1.

(b) June 11th, 1849.

(c) *PATTESON* and *WIGHTMAN, Js.*, were not in Court.

the justices to commit. It is urged that the suit in the Ecclesiastical Court may continue for an indefinite time; and it is easy to show by authorities how the proceedings there may be so lengthened under particular circumstances. But those are not the common ones; and there appears no reason for supposing that, in this case, the proceedings will not come to an end in the usual course. The refusal of this rule does not prevent a trial if the prosecutor chooses to go before a grand jury. We only say that we will not oblige the justices to hear an information.

*402] ***ERLE, J.**—The only question here is whether the magistrates are entirely without discretion as to hearing or refusing to hear the information. A civil suit is depending: they may see that the intention in prosecuting is to have a preliminary inquiry before justices into the matter of the suit. The real object of such an examination before justices is that the party accused may be put under such terms as will make it certain that he will be forthcoming for trial. But the magistrates, when applied to, may see no danger that he will not then be forthcoming; and they may think that justice would be prejudiced by hearing the information. Preferring a bill before a Grand Jury would not have that effect, because it is understood that such a proceeding is *ex parte*, and the matter which comes before the Grand Jury is not publicly known. There is no ground for saying that the magistrates, in a case of this kind, should be denied the exercise of a discretion.

Rule discharged with costs.

*403] ***In the Matter of a Plaintiff in the County Court of CAMBRIDGE, at CAMBRIDGE, between JOSHUA LILLEY and JOHN HARVEY. Nov. 24.**

A person who has been twelve months a prisoner in execution for non-payment of costs, awarded on discharge of a rule for Prohibition, may claim the benefit of stat. 48 G. 3, c. 123. For, since stat. 1 & 2 Vict. c. 110 (sect. 18), such award of costs is, for the purpose of stat. 48 G. 3, c. 123, equivalent to a judgment, without any further order of the Court.

NAYLOR, in this term, obtained a rule to show cause why the defendant should not be discharged out of the custody of the sheriff of Cambridge as to the execution to satisfy the executors of the above-named Joshua Lilley for costs on a rule of this Court of Trinity term, 1848. Harvey had obtained a rule nisi for a prohibition to restrain the Judge of the County Court and the plaintiff from further proceedings in the plaintiff Lilley v. Harvey. In Trinity term, 1848, Lilley's executors obtained a rule discharging the rule nisi with costs, which were taxed at 13*l.* 14*s.*; and Harvey was afterwards taken in execution for the said costs, at the suit of the ex-

ecutors. He had remained twelve successive calendar months in prison under the execution.

Burcham now showed cause, and contended that the case did not come within stat. 48 G. 3, c. 123, that act being only for the benefit of persons in execution on judgments in civil actions, as appeared by the words in sect. 1, "debt or damages not exceeding," &c., "exclusive of the costs recovered by such judgment:" and he cited *Rex v. Hubbard*, 10 East, 408, *Rex v. Dunne*, 2 M. & S. 201, and **Ex parte Kaye*, 1 B. & Ad. 652. He contended, further, that stat. [*404 1 & 2 Vict. c. 110, s. 18, giving to rules of Court "the effect of judgments," did not make the present order of the Court operative at once for the purpose of execution, without an attachment or a further rule; and, therefore, that Harvey was not in the situation of a person "in execution upon any judgment," within stat. 48 G. 3, c. 123, even if that act contemplated proceedings for a prohibition.

Naylor, contra, cited *Doe dem. Smith v. Roe*, 6 Dowl. & L. 544, and

The Court,(a) without hearing him further, discharged the rule.

Rule discharged.

(a) COLERIDGE and ERLE, Js. WIGHTMAN, J., was not in Court. ERLE, J., referred to the judgment of PARKER, B., in *Jones v. Williams*, 8 M. & W. 349, 358.† See also *Hodson v. Patterson*, 4 M. & G. 333 (E. C. L. R. vol. 43); *Doe dem. Pennington v. Barrell*, 10 Q. B. 531 (E. C. L. R. vol. 59).

*WILLIAM WILSON v. PETER DE ZULUETA, PEDRO DE ZULUETA, and MARIANO DE ZULUETA. [*405

Nov. 24.

Plaintiff and defendant being resident in England, and P. at Havana, and defendant being a foreign agent, a written agreement was entered into by plaintiff with defendant "in behalf and representation of P. of Havana" (so stated in the agreement), that plaintiff would proceed as fireman and stoker on board the T. steamer, then about to leave London for Havana, calling at intermediate ports, to be placed in the service of P., and would faithfully do the work of fireman or stoker on board the T., and obey the orders of the engineers. In consideration of the service, plaintiff was to receive wages at 5*l.* per month, payable monthly, and 2*l.* per month for providing himself in provisions. During the outward passage, rations were to be served out to plaintiff on account of P. The contract to be understood to be in force for one year certain from the date; and, should plaintiff be discharged before that time, three months' wages to be paid in advance, besides finding him a passage home; P. being at liberty to confirm and continue the engagement on the terms stated, or to discharge plaintiff and to find him his passage back to England: the wages to be payable up to the day of plaintiff's arrival in England, unless he should be discharged for misconduct: one month's pay to be advanced for plaintiff's outfit for the voyage.

Held:

1. That the agreement did not require a stamp, being within the exemption "memorandum or agreement for the hire of any labourer," in stat. 55 G. 3, c. 184, Schedule, Part I. tit. *Agreement*.
2. That defendant was liable for breaches of this agreement by the not serving of rations during the outward passage, by the discharge of plaintiff before the T. arrived at Havana, and by the non-payment of three months' wages in advance.

ASSUMPSIT. The declaration stated that heretofore, and before and

at the time of the agreement after mentioned, plaintiff and defendants, and the other parties to the agreement, excepting Don Antonio Parejo in the agreement mentioned, were resident in England, and the said Don Antonio Parejo, in the agreement after mentioned, was resident out of the United Kingdom of Great Britain and Ireland, at Havana, in the island of Cuba; and the defendants were then foreign agents; and, as such, entered into the contract and agreement. And thereupon afterwards, to wit, 30th March, 1848, a certain agreement in writing was made and entered into by and between the plaintiff (the party in the said agreement, and hereinafter, mentioned and described as William Wilson) and the other parties in the said *agreement, and *406] hereinafter, mentioned and described as William Roberts, &c. (mentioning nine besides plaintiff), and the defendants (the parties in the said agreement, and hereinafter, mentioned and described as Messieurs Zulueta & Co.): which said agreement was and is in the words and figures following. "It is this day mutually agreed between William Wilson," &c., "and Messrs. Zulueta & Co. in behalf and representation of Don Antonio Parejo, of Havana, as follows: That William Wilson," &c., "will proceed as firemen or stokers on board the Tridente steamer, which is about to leave London for Havana, calling at intermediate ports, to be placed in the service of the said Don Antonio Parejo. That William Wilson," &c., "will faithfully, and to the best of their abilities, discharge the duty and do the work of firemen or stokers on board the Tridente, and be particularly careful to obey the orders and follow the directions of the engineers in every respect. They engage to conduct themselves with sobriety and steadiness, to be respectful and moral in their conduct whilst in the service, and to subject themselves to its established rules and regulations; and no bilge or flue money allowed. That, in consideration for the faithful performance of this service, they will receive wages at the rate of 5*l.* per month, payable monthly, and 2*l.* per month for providing themselves in provisions. During the outward passage rations will be served out to them on account of the said Don Antonio Parejo; which they will have to cook themselves. This contract is understood to be in force for one year certain from this date: and, should they be discharged before that time, three months' wages *407] to be paid in advance, besides *finding them a passage home: Don Antonio Parejo being at liberty to confirm and continue the engagement on the terms heretofore stated, or to discharge them, and then find them their passage back to England. It is understood that their wages will be considered due, and will be payable, up to the day of their arrival back to England, unless they are discharged through ill conduct, disobedience, or inebriety; in which case their pay will cease on the day of their discharge. One month's pay is to be advanced for their outfit to the said , for the voyage; which amount they acknowledge to have received in cash.

Dated in London, this 13th day of March, 1848." Averment that, although the *Tridente* steamer, after the making of the agreement, to wit, on 20th March, 1848, left London, and proceeded upon her said outward passage in the agreement mentioned, and although plaintiff did then, to wit, on, &c., proceed as fireman or stoker on board the said steamer, and continued as such fireman or stoker on board the steamer until he was discharged and dismissed as after mentioned, and although plaintiff did, until he was so discharged and dismissed, well and truly perform and fulfil all things in the agreement contained on his part to be performed, &c., and although plaintiff, at the time that he was discharged and dismissed, was ready and willing to have continued as such fireman or stoker on board the steamer, and then and thenceforth to have well and truly performed and fulfilled all things in the said agreement on his part, &c., nevertheless that, during a large part of the time during which the steamer was proceeding on her said outward passage in the agreement mentioned, and before the *expiration of one [408 year from the date of the agreement, and before the dismissal and discharge of plaintiff as after mentioned, and before the commencement of this suit, to wit, from 21st March, 1848, until 14th August, 1848, the said rations in the agreement mentioned were not served out to plaintiff. That, whilst the steamer was on her outward passage, and before she arrived at Havana, and before the expiration of one year from the date of the agreement, and before the commencement of this suit, to wit, on 14th August, 1848, neither defendants nor Don Antonio Parejo would suffer or permit plaintiff to continue any longer on board the said steamer as such fireman or stoker, or any longer to observe, perform, or fulfil any of the matters or things in the agreement mentioned on plaintiff's part and behalf to be performed and fulfilled; nor would defendants, or Don Antonio Parejo, thenceforth perform or fulfil the said agreement on their or either of their parts and behalfs to be performed and fulfilled; and they then, to wit, on the day and year last aforesaid, wholly refused so to do, and then, to wit, on the day and year last aforesaid, wholly discharged plaintiff (but not for any ill conduct, disobedience, or inebriety of the plaintiff) from all further performance of the agreement, and from his employment as fireman or stoker on board the said steamer. That defendants have not, nor hath the said Don Antonio Parejo, or any person on their or either of their behalf, ever at any time paid to plaintiff the said three months' wages in advance from the day of the plaintiff's said discharge, or any part of such wages: And so plaintiff saith that defendants have broken their said agreement, &c.

*Plea 2. That defendants did not enter into the supposed contract and agreement, nor was the supposed agreement in [409 writing, in the declaration mentioned, made and entered into by and between the plaintiff and the said other parties in the said declaration

in that behalf mentioned and described and the defendants, in manner and form, &c. : Conclusion to the country. Issue thereon.

There were several other pleas leading to issues in fact.

On the trial, before ALDERSON, B., at the last Lewes Assizes, an unstamped agreement, corresponding to that set out in the declaration, was offered in evidence. It was objected, for the defendants, that, as the matter of the agreement was of the value of more than 20*l.*, it could not be received; and, further, that it showed no liability on the part of the defendants. For the plaintiff it was argued that the agreement was within the exemption after mentioned, and also that it bound the defendants as parties. The learned Judge reserved leave to move for a nonsuit, or verdict for defendants, on both points, received the evidence, and left the case on the disputed facts to the jury. Verdict for plaintiff on all the issues.

In this term, *Channell*, Serjt., obtained a rule *Nisi* for a nonsuit, or to enter a verdict for defendants on the issue upon the second plea, or to arrest the judgment.

Shee, Serjt., and *Lush* now showed cause.—First, as to the stamp. (a) *410] The plaintiff, as appears by the *agreement, was employed as a fireman and stoker: This document therefore comes within the exemption under the head *Agreement*, in stat. 55 G. 3, c. 184, Schedule, Part I., “Memorandum or Agreement for the hire of any labourer, artificer, manufacturer, or menial servant.” The argument on the other side is that the agreement shows the plaintiff to have been engaged as a mariner, and that mariners are not comprehended under the exemption mentioned, inasmuch as an agreement respecting a particular class of mariners is afterwards expressly exempted, namely, “Memorandum or agreement made between the master and mariners of any ship or vessel, for wages, on any voyage coastwise from port to port in Great Britain,” an exemption which, it is said, would be superfluous if all mariners were within the former exemption. The answer is that the plaintiff is not a mariner at all: he is employed merely to manage the steam engine. But it is said that stat. 7 & 8 Vict. c. 112 (“to amend and consolidate the laws relating to merchant seamen;” &c.) enacts (s. 63), “that every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same” (i. e. “any ship belonging to any subject of Her Majesty”) “shall be deemed and taken to be a seaman, within the meaning and for the purposes of this Act.” But, by the same Act, sect. 41, “all agreements,” &c., “made, signed, or executed in compliance with or under the provisions of this Act, shall be wholly exempt from stamp

(a) *Shee*, Serjt., contended that the evidence showed the existence of a duplicate original agreement, and that therefore the defendants ought to have shown that such duplicate was not stamped; and he referred to *Pooley v. Goodwin*, 4 A. & E. 94 (E. C. L. R. vol. 31): but the Court were of opinion that the existence of the duplicate was not shown.

duty." It is, *however, said that sect. 41 exempts only agreements in reference to ships belonging to English subjects, and [*411 that this is not such a ship: if that be so, sect. 63 is also inapplicable.

Secondly, the defendants were personally liable on this agreement. The contract, in terms, is made by the defendants "in behalf and representation of Don Antonio Parejo;" and, as the record shows, (a) at the time of making the agreement Don Antonio Parejo was out of the kingdom, and the immediate parties to the agreement were all in England. Don Antonio was therefore not liable at all: the credit was given to the defendants: for, where a principal resides abroad, the credit is given to the agent, though the principal be named in the contract. That doctrine is distinctly laid down by Lord TENTERDEN in *Thompson v. Davenport*, 9 B. & C. 78, 87 (E. C. L. R. vol. 17). To the same effect are Story, Commentaries on the Law of Agency, ss. 268, 290, and the language of EYRE, C. J., in *De Gaillon v. L'Aigle*, 1 B. & P. 368. *Thompson v. Davenport* was recognised as law in *Smyth v. Anderson*, 7 Com. B. 21 (E. C. L. R. vol. 62). It is, however, argued that this doctrine is confined to cases of the purchase of goods, and is inapplicable to an executory contract, especially a contract to be executed abroad. No authority can be shown for that distinction: the doctrine rests upon mercantile convenience, which applies to one class of contracts as much as to another. But, further, in this contract a power was reserved to Don Antonio to confirm and continue, or put an end to, the contract. He, therefore, was clearly not in the *first in- [*412 stance bound by it: and, in the mean time, the plaintiff must have looked to the defendants, and to them only. The first advances are to be made in this country before the ship leaves London.

Channell, Serjt., and *Peacock*, contrâ.—First, it is clear that the exemption from stamp in stat. 55 G. 3, c. 184, does not apply to agreements with mariners of any description, except that specially pointed out in the Schedule, Part 1: the question, therefore, is whether the plaintiff was a mariner. Now, independently of the general inference arising from the explanatory clause, sect. 63, of stat. 7 & 8 Vict. c. 112, respecting seamen in British ships, all who aid in navigating a vessel at sea are seamen and mariners. The plaintiff would have been treated as a mariner in a suit in the Admiralty Court.

Secondly, the principal, Don Antonio, was liable on this contract; and the defendants were not. The doctrine suggested on the other side is true only as a rule of evidence, by which contracts may be interpreted with respect to terms not actually expressed: but, where an express contract in writing is shown (which this, on the record, appears to be), the Court must gather the effect from the language. Where a party signs a written contract professedly as agent, he is at any rate not liable

(a) The allegation was traversed by the first plea; but the issue was found for the plaintiff.

on that account as a contractor, whatever other liability the facts may create; *Jenkins v. Hutchinson*, 13 Q. B. 744 (E. C. L. R. vol. 66). On an ordinary sale and purchase of goods in this country, it is a reasonable inference of fact, that the parties residing here are looked to as principals, *there being no express stipulation to the contrary: *413] where the agreement is to be performed abroad, the reason and the inference fail. It is true that the language of Story appears to go farther: but the instances on which he relies are sales of goods; such are *Paterson v. Gandasequi*, 15 East, 62, and *Thomson v. Davenport*; and drawing and acceptance of bills. *De Gaillon v. L'Aigle* is reported at a stage(a) earlier than that at which the dictum of EYRE, C. J., which has been referred to, occurred; and that case also appears to have arisen upon a sale of goods. In *Smith's Mercantile Law*, p. 132 (4th ed.), B. i. ch. 5, s. 4, the doctrine is laid down in general terms; but the authorities cited are *Paterson v. Gandasequi*, and *Thomson v. Davenport*; so that the author is clearly speaking of sales of goods. The utmost that can be said is, that residence abroad raises a presumption to be rebutted: but the written agreement here does rebut the presumption. If the rule be as general as is suggested on the other side, it would follow that a written contract, made in England by an agent expressly in that character, for a clerk to reside abroad with a principal named, during three years, to be there instructed, raised only a contract with the agent as principal.

COLERIDGE, J.(b)—I am of opinion that this rule must be discharged. As to the first point, relating to the stamp, I agree that, if the plaintiff were a seaman, there would be a great deal in the argument *414] *which has been urged from the exemption which the schedule contains with respect to an agreement between master and mariners. But I think we must look on the plaintiff, and those who joined with him in the agreement, simply as labourers and artificers. They agreed to discharge the duty, and do the work, of firemen and stokers on board the ship, and to obey the orders and follow the directions of the engineers. No doubt, if that contract related to service on a common locomotive engine, the contractors would be labourers; whether they would be artificers I do not know. The circumstance that the service was to be performed on board a ship did not make them seamen. The agreement, therefore, is fully within the words "memorandum or agreement for the hire of any labourer." As to the second point, I do not think it necessary to lay down the general rule, to which my brothers *Shee* and *Channell* have adverted, that, wherever an agent in this country, on behalf of a principal residing abroad, makes a contract to be performed abroad, the agent is to be considered liable to the contract, thus extending the rule which has prevailed in the case of goods sold which are to be delivered here. In the present instance, we are

(a) 1 B. & P. 357.

(b) PATTERSON and WIGHTMAN, Js., were absent.

dealing with a written contract; and the question is to whom, upon that contract, the credit is given. I think, in the first instance at all events, the intention was to make the party at home liable. There are things to be performed, partly here, partly and contingently abroad, and partly on what may be called neutral ground, on the high seas. In the first instance, to carry out the contract, one month's pay is to be advanced, which must be done here. When the difficulty is suggested of an action here instead of abroad, in respect to a *breach which may take place abroad, it may be answered that there is a diffi- [*415] culty also if the parties, when they come here, have to prosecute their action against a foreigner: one difficulty seems to meet the other. The contract is to be in force for a year certain; and, if the stokers be discharged before that time, three months' wages are to be paid in advance, and a passage home to be provided for them. Then come the words "Don Antonio Parejo being at liberty to confirm and continue the engagement on the terms heretofore stated, or to discharge them, and then find them their passage back to England." Now when the parties entered into that contract, they seem to have considered Don Antonio to be perfectly free until the vessel arrived at Havana; and then he was to continue the contract if he pleased. That might possibly raise a new contract. But suppose Don Antonio chose to say he would do nothing: was he not at liberty to say so? Were then the contractors to be without any remedy? But, if you understand them to say to the agent, "We agree with you now, but have no objection to substitute Don Antonio afterwards," then all the objections and difficulties disappear.

ERLE, J.—I am also of opinion that this rule should be discharged. The first question is, whether the agreement which the plaintiff, in the capacity of a stoker, has made with the defendant (as we may assume, so far as regards this question), as a merchant, to do labour on board the ship, is an agreement for the hire of a labourer or an artificer, the statute having exempted such agreement from stamp duty. If the matter stood there, no man would doubt that a stoker hired to *work an engine on land would be a labourer, whether the engine [*416] were movable or not: and it would make no difference that the engine were one movable on water: the stoker would not for that reason cease to be a labourer. But then it is said that another exemption specifies an agreement with a particular class of mariners, thus showing that the exemption first mentioned does not include mariners. I do not know that this reasoning is very satisfactory. Sometimes general words are followed unnecessarily by specific words in a distant part of a statute. I should construe the words, upon which such an argument is founded, with some strictness; and it seems to me that the argument here is a considerable strain upon the words. But in this contract I find that the stoker is to obey the orders of the engineers. Therefore, putting

even the limitation contended for upon the exemption as to agreements with labourers, the plaintiff not being a mariner, the agreement would be within the exemption. It is matter of common knowledge that words in one act of parliament may have a meaning which they would not have in another: and I do not mean to say that the plaintiff might not, under some other act of parliament, be subject to liabilities as a mariner. But my judgment is limited to the interpretation of the Schedule to the Stamp Act. Then as to the question respecting the liability of the defendants on this contract. The defendants describe themselves as entering into it "in behalf and representation of Don Antonio Parejo." Now, without going the length of the argument urged on behalf of the plaintiff, that all contracts made here by an *417] agent on behalf of a foreign principal are to be considered as the contracts of the *agent, and without limiting the rule to the case of goods sold and to be delivered in England, that is to say, without adopting either the extreme rule or the extreme limitation, I think the defendants have here made themselves liable for at any rate a part of the contract. The cases are well known in which an attorney has been held personally liable upon a contract made by him with a party who knew him to be acting as attorney.(a) Now, here the parties stipulate that they shall proceed on board the ship which is going to Havana, to be placed in the service of Don Antonio: he has power to confirm and continue the engagement at Havana, or to discharge the plaintiff. I cannot understand how this contract was to take effect if the meaning be that from the first no liability is looked to except that of Don Antonio. My brother *Channell* has pressed upon us the case of a party who contracts to serve abroad: but that is a case excluded here, because the discharge may take place, and has in fact taken place, before the arrival of the ship in a foreign port. Rule discharged.

(a) See the authorities cited in *Downman v. Williams*, 7 Q. B. 103 (E. C. L. R. vol. 53).

*418] *ANN LEVY v. RAILTON. Nov. 26.

If a plea be so pleaded that it is manifestly intended to embarrass the plaintiff, the Court, on affidavit that the plea is false, will set it aside.

As, where, to an action by the second endorsee of a bill of exchange against the acceptor, defendant pleaded that the acceptance was obtained from him by fraud of the drawer, that the bill was overdue when endorsed by the drawer to the first endorsee, and that both endorsees, at the time of taking the bill, had notice of the premises.

A plea under such circumstances is not treated as a mere irregularity.

HAWKINS, in this term (9th November), obtained a rule to show cause why the pleas pleaded herein should not be set aside, and why the plaintiff should not be at liberty to sign judgment, and why the defendant should not pay the costs of this application.

From the affidavits in support of the rule it appeared that the declaration was in assumpsit on a bill of exchange drawn on 20th July, 1849, by Otto Henry Kaselaack and Rudolph Neubaur upon defendant, payable to their order, for 21l. 12s., at two months, accepted by defendant, endorsed by Kaselaack and Neubaur to John Wolff, and by Wolff to plaintiff. The defendant pleaded: "That the defendant's acceptance of the said bill was obtained by the said O. H. K. and R. N. by fraud and covin practised upon him, the defendant, by the said O. H. K. and R. N., and others in collusion with them: and the defendant further says that the said bill was payable and over due, according to the tenor and effect thereof, before and at the time when the same was first endorsed by the said O. H. K. and R. N. to the said J. W., and before and at the time when he endorsed the same to the plaintiff, and when the said J. W. and the plaintiff respectively first took and received the same: and that the said J. W. and the plaintiff respectively had notice of the premises in this plea alleged before and at the time when they respectively first took and *received the same bill:" verification. [*419] The affidavits set out the consideration for the acceptance, namely, the sale and delivery of champagne to the defendant, at his request, by the drawers; they further stated that the endorsement to Wolff was for a bonâ fide and valuable consideration; and that "the plea pleaded herein is wholly false and untrue." The defendant had obtained leave to plead several pleas; but he had not drawn up the order and had delivered merely the above. From the affidavit in answer it appeared that the plea had been delivered on last 8d November, and plaintiff had on 8th November been served with a rule to reply; but no replication had been delivered; and that a summons had been taken out on 6th November to set aside the plea, and had been heard, on 7th November, at chambers, before WIGHTMAN, J., who had refused to make any order on the summons. There were no depositions to the truth of the plea.

Lush now showed cause.—The application is too late. [WIGHTMAN, J.—It is not a case of ordinary irregularity.] The plaintiff may reply *De injuriâ*: the defendant will undertake not to demur. The plea may possibly be open to a special demurrer, for duplicity: but it is not to be therefore set aside. It has been held that a single plea is not to be set aside upon affidavit that it is false; *Smith v. Backwell*, 4 Bing. 512 (E. C. L. R. vol. 13, 15).

Hawkins, *contrâ*.—In *Smith v. Backwell* the only objection to the plea was that it was sworn to be false. The defendant here, if he had not intended to embarrass the plaintiff, might have pleaded the matter *of supposed defence by different pleas. *Smith v. Backwell* was [*420] cited in *Smith v. Hardy*, 8 Bing. 435, where the Court, distinguishing the case from *Smith v. Backwell*, set the plea aside, "as presenting two points for issue;" it being sworn that the plea was false.

The same principle was acted upon in the Exchequer, four days ago. in *Nutt v. Rush*, 4 Exch. 490.† There PARKER, B., said that the plaintiff “ought not to be subjected to the inconvenience of having to consult his counsel as to the proper method of replying.” (He was then stopped by the Court.)

COLERIDGE, J.(a)—It is important not to part with our jurisdiction in such cases; though we must exercise it with the greatest possible caution. And, where a plea is false in fact and puts the plaintiff into a difficulty as to the mode of replying, we ought always to act upon the principle which has been laid down, and set the plea aside.

WIGHTMAN and ERLE, Js., concurred.

Rule absolute.

(a) PATTERSON, J., was absent.

END OF MICHAELMAS TERM.

***MICHAELMAS VACATION.(a)**

[*421]

The QUEEN v. HOLBOROW. Nov. 28.

An order of Sessions, whereby, after reciting that an appeal has been entered by a putative father against an order of maintenance, the Sessions (under stat. 8 & 9 Vict. c. 10, s. 3) refuse to allow the appeal, for insufficiency of the notice of recognisance, and confirm the order of maintenance with costs, is bad by reason of the improper confirmation.

Notice of recognisance, under stat. 8 & 9 Vict. c. 10, s. 3, is sufficient, though it do not state that the recognisance has the several conditions required by that clause, but, only, that it is conditioned for trial of the appeal.

ON appeal against an order of two justices for maintenance of a bastard, the following order was made by the Quarter Sessions.

"Whereas Thomas Holborow did at this Sessions enter his appeal against an order under the hands and seals of George Heneage Walker Heneage, Esq., and John Guthrie, clerk, two of Her Majesty's justices of the peace in and for the said county of Wilts, made at a Petty Session," &c., "holden in and for," &c., "at the town hall at Calne," &c., "and bearing date the sixteenth day of October last past, whereby the said T. H. was adjudged to be the putative father of a certain bastard child born of the body of Lucy Witchell, and ordered to make certain payments therein mentioned in respect of such bastard child: Now, on hearing counsel on both sides, this Court doth refuse to allow the said appeal, for insufficiency of notice of the recognisance, and doth confirm the said order: and, in pursuance of the statute in such case," &c., "this Court doth order that the said T. H. do pay to the said Lucy Witchell, in whose behalf the said appeal is determined, 21l. 5s. 6d. for her costs in and about the said appeal, subject to the opinion of the Court of Queen's Bench on the following case."

*When the appeal was called on, the counsel for the appellant [*422 proposed to prove his notice; when he was met by an objection from the counsel for the respondent that the notices of recognisance were not sufficient, inasmuch as, upon the face of the said notices, it did not appear that the recognisance was conditioned as required by stat. 8 & 9 Vict. c. 10, s. 3. The Court of Quarter Sessions allowed the objection, and refused to allow the appeal; and the order stood confirmed, subject to the opinion of the Court of Queen's Bench. The notices were as follows.

"To Lucy Witchell.

"As the attorney for and on behalf of Thomas Holborow, of," &c., "farmer. I hereby give you notice that the said T. H. did, on the 16th day of October instant, enter into a recognisance before a justice of the peace acting in and for the county of Wilts (such justice of the peace being one of the two justices of the peace making the order hereinafter

(a) The Court sat in Banc on the 27th, 28th, and 29th of November, and the 4th, 5th, 6th, 7th, and 18th of December.

mentioned), to try his appeal at the General Quarter Sessions of the peace for the county of Wilts, to be holden at Devizes in the said county after the period of fourteen days next after the making of the said order, against an order of affiliation made on the said 16th day of October instant, whereby he was adjudged to be the putative father of a bastard child of which you had then been lately delivered. Dated this 19th day of October, 1848. (Signed) WILLIAM STEPHENS JONES."

"To Lucy Witchell.

"Take notice that I, the undersigned Thomas Holborow, did, on the 16th day of October instant, enter *into a recognisance before *423] G. H. W. Heneage, Esq., and the Rev. J. Guthrie, or one of them, being the justices or a justice of the peace acting in and for the county of Wilts, to try my appeal at the General Quarter Sessions of the peace for the county of Wilts, to be holden at Devizes in the said county after the period of fourteen days next after the making of the order herein mentioned, against an order of affiliation made," &c. (describing the order as in the preceding notice, down to the words "lately delivered"). "Dated this 19th day of October, 1848.

(Signed) THOMAS HOLBOROW."

The question for the opinion of the Court is: Are these notices sufficient, without a further statement of the condition of the recognisance? If the Court should be of opinion that these notices are not sufficient, then the order of Sessions, and the order of the justices, are to be confirmed. If the Court should be of the contrary opinion, then the said appeal is to be sent back to the Court of Quarter Sessions to be heard.

Hodges, in support of the order of Sessions.—By sect. 3 of stat. 8 & 9 Vict. c. 10, which amends stat. 7 & 8 Vict. c. 101, the recognisance to be given by the appellant in bastardy, under sect. 4 of the last-mentioned act, must be conditioned for three things; appearance at the Sessions, trial of the appeal there, and payment of costs if ordered: the appellant must give to the woman a notice in writing of his having so entered into "such recognisance;" and, unless he enter into the *424] *recognisance and give "such notice or notices as aforesaid," the appeal shall not be allowed. The notice, therefore, ought to show that the recognisance contains all the required conditions; and that is not done here. [PATTESON, J.—Would it be enough to state in the notice that the appellant had entered into a recognisance "pursuant to the statute?"] It perhaps might.

Slade, contra.—The question is on the sufficiency, not of the recognisance, but of the notice of recognisance. The object of that notice is only to apprise the woman that the appellant has put himself in a situation to quash the order of maintenance if she does not appear at the Sessions. The particularity insisted upon might rather be expected

in the notice of appeal; but that, by stat. 7 & 8 Vict. c. 101, s. 4, is not required even to be in writing. There is a common form of recognisance and condition annexed to stat. 8 & 9 Vict. c. 10 (Schedule No. 9), which the act, sect. 1, makes sufficient in all cases; the notice cannot give any additional information.

PATTESON, J.—This order of Sessions is strange. The Court confirm the order of justices, though, by stat. 8 & 9 Vict. c. 10, s. 3, if they think that proper notice of recognisance has not been given, the appeal “shall not be allowed.” If they could not entertain the appeal, I do not see how they could confirm the order. I think the notice here was sufficient; and at all events, if, by the statute, the defendant was not in Court, the Sessions could not make an award of costs against him.

*ERLE, J.(a)—I think the notice was sufficient. And if the Sessions thought the appellant had no locus standi, they ought [*425 not to have confirmed the order.

Order of Sessions quashed.(b)

(a) COLERIDGE, J., had left the Court.

(a) See, as to the form of notice, *Regina v. Recorder of Leeds*, 1 Lowndes & Maxwell's Bail Court Cases, 50.

The QUEEN v. The Inhabitants of OVER. Nov. 28.

Appellants entered and respited an appeal against an order of removal, but did not deliver grounds of appeal. Afterwards they gave notice of abandoning their appeal, but did not satisfy the respondents as to costs. The respondents, therefore, went to the next Quarter Sessions, and moved (the appellants not being present) that the order might be confirmed. The Sessions (after stat. 11 & 12 Vict. c. 31) confirmed the order of removal, and awarded costs to be paid by the appellants to the respondents.

Held, on certiorari and motion to quash, that, although the confirmation was an excess of authority, the order of Sessions was valid as to the award of costs.

TOWNSEND, in last Easter term, obtained a rule to show cause why the after-mentioned order of Sessions, brought into this Court by certiorari, should not be quashed. The facts of the case, shown by affidavit, were as follows.

Two justices made an order for the removal of Ann Austin and her children from the township of Parr in Lancashire to the township of Over in Cheshire. On 29th of May, 1848, the overseers of Over gave notice of appeal against the order for the next Lancashire Quarter Sessions to be holden at Kirkdale; but they did not serve grounds of appeal. On July 8th, 1848, the attorneys for the appellants wrote to the attorneys for the respondents, stating that they had not been instructed in time to serve grounds of appeal for the ensuing sessions, and should therefore enter and respite; and that the attorneys, respectively, would, if they met at those sessions, probably have an oppor-

tunity of coming to terms. The respondents' attorneys answered that *426] they *thought the appellants could not then enter and respite, having given notice of appeal, and having had time to serve grounds. On July 12th, 1848, the Kirkdale sessions were held; and one of the attorneys for the appellants met there Mr. Heyes, attorney for the respondents; and he (as was stated in the affidavit on behalf of the appellants), after some conversation, did not think fit to oppose the entering and respite, and the appeal was thereupon entered and respited. On 15th September, 1848, the attorneys for the appellants wrote to the attorneys for the respondents that they abandoned the appeal, and that the paupers might be removed. The attorneys for the respondents thereupon sent to the appellants a bill of costs, saying: "We have received your note" "expressing an intention of abandoning this appeal, and, in reply, beg to enclose our account of costs consequent upon the appeal." "On receiving your undertaking to pay" expense of past relief and "the costs, we will inform the overseers of Parr that the paupers may be removed." The appellants' attorneys, in answer, denied (except as to one item) that the appellants were liable to costs. The respondents' attorneys insisted that they were entitled to the costs of attendance at Kirkdale, as consequent on the notice of appeal: and, this not being assented to, they stated that, under the circumstances, they considered the appeal still depending, and should go to the next sessions, prepared to try.

The appellants did not serve any new notice of appeal or any notice of grounds; nor did they make any further entry of an appeal. But at the Kirkdale sessions held November 1st, 1848 (the next after the *427] entry and respite), the order in question was made: *by which, after reciting that the appellants did not appear, the Court, on motion by the respondents, did "adjudge, order, and direct that the said order of removal be, and the same is hereby confirmed. And this Court doth, upon the like motion of counsel for the said respondents, and upon like due consideration of the premises, think fit to order and direct, and doth hereby accordingly adjudge, order and direct, that the overseers of the poor of the said township of Over do and shall, upon demand, and upon production of this order to them or any one of them, pay or cause to be paid unto the said overseers of the poor of the said township of Parr the sum of 17l. 13s. 10d., as and for their costs and charges in this appeal." And the Court certified that amount to be reasonable.

Cowling now showed cause.(a)—The Sessions had jurisdiction over the appeal by the entry and respite, and had authority to give the costs, under stat. 8 & 9 W. 3, c. 30, s. 3. There was no other way in which the respondents could obtain them. *Regina v. Stoke Bliss*, 6 Q. B. 158 (E. C. L. R. vol. 51), on which the present application proceeds,

(a) Before PATTESON, COLERIDGE, and ERLE, Jc.

is distinguishable from this case. There the appellants gave notice of appeal against the order of removal, but countermanded it and never entered an appeal; the respondents entered it; and the Sessions confirmed the order, which they had no authority to do under the circumstances, and made an order for costs, which this Court considered ancillary to the confirmation. [PATTESON, J., mentioned stat. 11 & 12 Vict. c. 31, s. 8.] *That relates only to costs payable by those who effectually abandon an order of removal. A further remedy [*428 has been given, but since the proceedings in question, by stat. 12 & 13 Vict. c. 45, ss. 5, 6.

Townsend, contra.—The respondents might have obtained their costs regularly under stat. 8 & 9 W. 3, c. 30, without asking the Sessions to confirm an order over which (by stat. 4 & 5 W. 4, c. 76, s. 81) they had no jurisdiction for that purpose, no grounds of appeal having been delivered. The objection is substantially the same as that which prevailed in *Regina v. Stoke Bliss*: and the appellants' view of the case is consistent with *Regina v. The Justices of Cheshire*, 8 A. & E. 398 (E. C. L. R. vol. 35), and *Regina v. Oundle*, 3 Q. B. 353, note (a) (E. C. L. R. vol. 43). The respondents had no occasion, after notice of abandonment, to attend the Sessions in support of the order. And the express entry of a confirmation was more prejudicial than the mere existence of an order not appealed against. [ERLE, J.—An order unappealed against is conclusive upon all the world.] It has not precisely the effect of a confirmation, which is a direct adjudication on the settlement.(a) In *Regina v. The Justices of the West Riding (Sheffield v. Crich*, 5 Q. B. 1 (E. C. L. R. vol. 48)), where the appellants had countermanded their notice of appeal, and the respondents afterwards entered the appeal without their consent, and the order was confirmed, this Court ordered the entry to be erased because it might prejudice the appellants on a future occasion. The confirmation, *upon [*429 such entry, though irregularly made, might stand in the way of a second appeal. [ERLE, J.—Could there be a second appeal?] *Regina v. Macclesfield*, 13 Q. B. 881 (E. C. L. R. vol. 66), is an instance. [ERLE, J.—There the first appeal was against an order of removal, and was a nullity: and a second appeal was lodged against the removal itself.(b)] The first appeal here was a nullity for the same reason, that no grounds of appeal had been served. The Sessions had no power to hear and determine. The notice of intended entry and respit was a mere form; *Regina v. Justices of Surrey*, 6 Dowl. & L. 735: it could not for ever preclude the appellants from renouncing an appeal: and notice of abandonment was given six weeks before the Sessions.

Cur. adv. vult.

(a) *Townsend* referred here to Theobald on the Poor Laws. See Ch. 16, s. 3.

(b) See *Regina v. The Justices of Middlesex*, 9 Dowl. P. C. 163.

PATTESON, J., on a subsequent day of the vacation (December 7th), delivered the judgment of the Court.

In this case the appeal had been duly entered and respited after notice to the respondents; and the appellants subsequently gave notice to the respondents that they abandoned the appeal: but, as the appellants had not paid the costs, the respondents had a right to apply for them at the next Sessions under stat. 8 & 9 W. 3, c. 30, s. 3. Under these circumstances a judgment that the appeal be dismissed and costs be paid would have been right; and the judgment that the order be confirmed was an excess of authority; but we think that the order need not on that account be quashed, as the costs would be the same whether *430] the appeal was dismissed or the order confirmed, and *the rights of the parties are not affected by the entry that the order was confirmed.

In *Regina v. Stoke Bliss*, the appellants, after notice of appeal against the order, countermanded the notice before entry, stating an intention to appeal against the removal. Under these circumstances an entry of the appeal by the respondents, and a judgment that the order be confirmed, was a material excess of jurisdiction, as the right of the appellants to appeal against the removal was thereby taken away, and the entry of the appeal by the respondents is not shown to have been justified. The case is on these grounds substantially different from the present.

The rule, therefore, for quashing the order of Sessions must be discharged. Rule discharged.

THE QUEEN v. The Inhabitants of ST. MARY IN BUNGAY.
Nov. 28.

Reported 12 Q. B. 38 (E. C. L. R. vol. 64).

*431]

*STEELE v. HOE. Dec. 7.

S. and another, the deacons of a Baptist Congregation, being receivers of its general funds, and managers of its finances, bound themselves (by writing) to J. E., then resigning the office of minister of the church, to repay him, with half-yearly interest, 700*l.*, which he had advanced for the building of a chapel. Besides the general revenue above mentioned, there were funds vested in trustees, which were usually applied to the maintenance of the minister for the time being, and were likewise applicable to the relief of the poor. After the undertaking to J. E., a new minister was appointed; and he agreed with the Congregation that he would be responsible to S., who was still deacon, and to any future deacon or deacons, for the continued repayment of J. E.'s debt; and he also consented that periodical payments of it should be made out of the trust funds. S. afterwards resigned; and the new minister gave him a written undertaking as follows.

"In consideration of your having resigned the office of deacon and your connexion with the Baptist Church," at, &c., "I hereby agree to hold myself responsible to you for the payment of the sum of 150*l.*, due to the Rev. J. E. by the Baptist Church," &c., "and also the interest for the same, at the rate," &c. (5 per cent., payable half-yearly), "being the residue of the sum of 700*l.*, principal and interest, remaining unpaid, for which you" "became responsible," &c., "by an instrument," &c. (the writing first above mentioned).

Held, on argument of a special case, in an action by S. on this promise, that the written instrument given by the minister showed a valid contract; for that the words might import either a past or a concurrent consideration on S.'s part, and that construction was to be preferred which made the instrument good.

ASSUMPSIT. The declaration stated that, before and up to the making of the defendant's promise after mentioned, the plaintiff had been and was a member of a certain congregation and church of Protestant Dissenters, to wit, the Congregation and Church of Baptists, at Clapham, and had then long held a certain office in the said congregation and church, to wit, the office of deacon. And that, during the time the plaintiff was such member, &c., and such a deacon, &c., and before the making of the promise, &c., to wit, on 25th September, 1840, by a certain instrument in writing, signed by plaintiff and one Paul Millard, then also being a deacon of the said church, and addressed to one John Edwards, in pursuance of a certain agreement made between the said church and the said J. Edwards, at the time of the said J. E. resigning the office of minister and pastor of the said church as in the said instrument mentioned, in consideration of the said J. E. having resigned the pastoral office over *the said church upon the terms therein mentioned, and the said church, at a church [*482 meeting held, &c., having accepted such resignation, and having agreed at the earliest possible period to pay to J. E. 700*l.*, and also interest at 5*l.* per cent. per annum every six months, until the full amount of 700*l.* principal and interest should be fully paid, they, the plaintiff and the said P. Millard, as deacons of the said church, thereby agreed to hold themselves responsible to J. E. for the carrying out the said agreement. That, at the time of the making of defendant's said promise, 550*l.*, part of the said principal sum of 700*l.* had been paid by the said church to the said J. E. And that, at the time of the making of the said promise, defendant was the pastor and minister of the said congregation and church. And thereupon, heretofore, to wit, on 10th March, 1845, in consideration that plaintiff, at the request of defendant, *would resign the said office of deacon*, and his connexion with the said Baptist church and congregation at Clapham, defendant *then promised plaintiff* to hold himself responsible to plaintiff for the payment of the said sum of 150*l.* so due to the said J. E. by the said Baptist church at Clapham, and also the interest for the same at the rate, &c., payable every six months, being the residue of the said sum of 700*l.* principal and interest remaining unpaid, for which plaintiff and the said P. Millard had become responsible to J. E. as aforesaid. Averment, that plaintiff did then, to wit, on, &c., resign the said office of deacon and

his connexion with the Baptist church and congregation at Clapham : and that, after the time of the said Baptist church agreeing to pay the said J. E. the said 700*l.* and interest as *aforesaid*, to wit, on, *433] &c., and on divers other days, &c., between that day and the day of the said J. E. applying to plaintiff for payment of 150*l.* and interest, as after mentioned, the said Baptist church had the power and means of paying, to wit, out of the funds of the same church, and, but for their own neglect and default, could and might and ought to have paid, the whole of the said sum of 700*l.* and interest to the said J. E. ; and, at the time of J. E. applying to plaintiff, &c., as after mentioned, a reasonable and proper time for the said Baptist church paying to the said J. E. the whole of the said 700*l.* and interest, according to the said agreement, had long elapsed : yet the said Baptist church had not at the time of the said J. E. applying to the plaintiff, &c., as after mentioned, nor have they since, paid to the said J. E. the said 150*l.*, the residue of the said 700*l.* ; and the said interest and the said 150*l.*, and a certain other sum, to wit, of 5*l.* 12*s.* 6*d.* for interest upon the said 150*l.* after the rate *aforesaid*, then was wholly due and unpaid to the said J. E. : and thereupon, &c. Averment, that J. E., while the said sums of 150*l.* and 5*l.* 12*s.* 6*d.* were due to him as *aforesaid*, applied to plaintiff for payment to him thereof, and then gave plaintiff notice that he, J. E., should commence an action at law against plaintiff for the said sums, if the same were not forthwith paid by him to J. E. ; and thereupon plaintiff afterwards, to wit, on, &c., 1845, was forced and obliged to pay and necessarily did pay to J. E. the said sums of 150*l.* and 5*l.* 12*s.* 6*d.* ; of all which premises, &c. : averment of notice to defendant, and request by plaintiff to him to pay plaintiff the 150*l.* and 5*l.* 12*s.* 6*d.*, according to defendant's promise : and that, although a *434] reasonable *time* for defendant to pay plaintiff the said sums had at the commencement of this suit long elapsed, yet defendant has not paid, &c.

Pleas. 1. That plaintiff and Millard did not make the agreement, &c., in manner and form, &c.

2. Non assumpsit.

3. That the said Baptist church had not the power or means of paying, nor could or might they have paid, the money in the declaration mentioned, in manner, &c.

4. That, at the time of Edwards applying to plaintiff for payment, &c., a reasonable and proper time for the said Baptist church paying to Edwards the whole of the said sum of 700*l.* and interest according to the terms of the agreement in that behalf had not elapsed.

5. As to 4*l.*, parcel of the 5*l.* 12*s.* 6*d.*, alleged to have been paid by plaintiff for interest, tender of the 4*l.*, which defendant now brought into Court.—Verification.

The first four pleas concluded to the country ; and issues were joined

thereon. The plaintiff replied to the fifth plea, admitting tender, and taking the 4*l.* out of Court.

On the trial, before Lord DENMAN, C. J., at the sittings in London, after Trinity term, 1847, a verdict was found for the plaintiff for 150*l.*, subject to the opinion of this Court upon a case, the material parts of which are as follows.

The plaintiff, at the date of the agreement of 25th September, 1840, hereinafter set forth, was one of the deacons of the Baptist church at Clapham; and the defendant was, from 2d July, 1842, and at the time of the commencement of this action, the minister of the said church. The church consists of such of the *congregation as are admitted to membership: they alone have the choice of the minister, [*435 and of the deacons: the pew rents and collections are received by the deacons, who are members of the church, and who have the sole management of its finances. In September, 1840, Mr. Edwards, who was then the minister of the church, and had advanced 700*l.* towards the erection of the chapel, resigned his office: and the following agreement with Mr. Edwards was entered into and signed by the plaintiff and a Mr. Millard, at that time the other deacon of the church.

Clapham,

“Rev. JOHN EDWARDS.

September 25, 1840.

Reverend Sir,—In consideration of your having resigned the pastoral office over the Baptist church at Clapham, and the church, at the church meeting held last evening, having accepted the same, and agreed at the earliest possible period to pay to you the sum of 700*l.*, and also to pay to you interest at the rate of 5 per cent. per annum every six months until the full amount of 700*l.*, principal and interest, be fully paid; we, the deacons of the said church, hereby agree to hold ourselves responsible to you for the carrying out of the said resolution.

“We remain, &c.

“THOMAS STEELE, PAUL MILLARD.”

This sum of 700*l.* was reduced by successive payments, between September, 1840, and March, 1845, to 150*l.*; which sum remained due to Mr. Edwards at the date of the agreement next set out. In March 1845, the defendant entered into and signed the following agreement with the plaintiff.

*Clapham,

“To Mr. THOMAS STEELE.

March 10th, 1845.

[*436

Sir,—In consideration of your having resigned the office of deacon and your connexion with the Baptist church and congregation at Clapham, I hereby agree to hold myself responsible to you for the payment of the sum of 150*l.*, due to the Rev. John Edwards by the Baptist church, Clapham, and also the interest for the same, at the rate of 5 per cent. per annum payable every six months, being the residue of the sum of 700*l.*, principal and interest, remaining unpaid, for which you

and Mr. Paul Millard, deacons of the said church became responsible to the Rev. John Edwards by an instrument bearing date September 25th, 1840.

I remain," &c.,

"BENAIAH HOE."

In December, 1845, the said sum of 150*l.*, together with interest amounting to 5*l.* 12*s.* 6*d.*, not having been paid to Mr. Edwards, he made application through his solicitor to the plaintiff, who paid him 155*l.* 12*s.* 6*d.*, being the amount of the principal and interest remaining unpaid. The defendant was thereupon called upon, in pursuance of this agreement of 10th March, 1845, to repay that amount to the plaintiff. He refused to do so.

In May, 1842, the amount of the debt due from the church to Mr. Edwards had been reduced to 500*l.*; and on the 31st of that month the following resolution was entered in the church books and signed by the plaintiff (among others). "Resolved that the Rev. Benaiah Hoe be respectfully invited to supply the pulpit for one month from the 12th *437] of June, with a *view to the pastoral office, with a clear understanding that he agrees to the following conditions.

1. That the future pastor of this church be required to give satisfactory pledge, previous to his election to office, that the debt due to Mr. Edwards by the church, amounting to 500*l.*, with interest, be paid from the chapel funds, not less than 100*l.* per annum, at 50*l.* each half year, besides interest.

On 30th June following the defendant was elected pastor: and on that occasion the following resolution was entered in the church books, and signed by the plaintiff (among others), and was also signed by the defendant on 2d July following.

Clapham, June 30th, 1842.

"Resolved,

"That the Rev. Benaiah Hoe be respectfully invited to become pastor of this church on condition as follows. 1st. That the said Rev. B. Hoe agrees to become legally responsible to Thomas Steele, the present deacon, or any other deacon or deacons that may be chosen by the church in future, for the payment of the sum of 500*l.*, a debt due to Mr. John Edwards by the church; and hereby consents and agrees that the trustees of the late Abraham Atkins, Esquire, viz. Messrs. Robarts and others, pay to Thomas Steele, or other deacons of the church that may be chosen, the sum of 100*l.* per annum, at 50*l.* each half year, for the purpose of liquidating the above debt due to Mr. Edwards; and that he further agrees that the interest of the above debt be paid half-yearly from the church's funds until the whole debt *438] due to Mr. Edwards be fully paid principal and *interest. Ceasing to be pastor of the church, this agreement to be null and void.

2d. "That, whenever a majority of the members of this church shall declare that the pastor for the time being is not acceptable to it, such declaration shall, at the expiration of three months from the day on which it was made, determine and put an end to all relations between this church and its pastor, releasing the pastor from all services otherwise due to the church, and depriving him of all salary and emolument which he might be otherwise entitled to claim. That no election of a pastor to this church shall be complete until he shall have signed the foregoing regulation in token of his willingness to its provisions.

3d. "That the church at Rochdale gave him an honourable dismission.

"Signed on behalf of the Church. }
Done at our Church meeting this } Signed by "Thomas Steele, Deacon," and three other persons.
day, 30th June, 1842."

"I hereby accept the church's invitation on the terms above named.
2d of July, 1842. BENAIAH HOE."

The trustees for the time being of the fund called "Atkins's Trust," which is to be distributed at the discretion of the trustees for the support of the poor of the congregation and to the maintenance of the minister, in such proportions as the trustees may think proper, in the several following years paid to the several persons the sums of money set opposite their respective names from the funds of the said trust. (The case then stated various payments made to the minister and deacons, from 1840 to 1847 (inclusive), of different *amounts [*439 from 75*l.* to 300*l.*]) The whole of the foregoing sums were paid by the trustees expressly for the minister's income; and the trustee who was called by the plaintiff at the trial stated that he was not aware of any other endowment; that he had never, since the defendant's appointment, paid anything which might be appropriated to the payment of Mr. Edwards's debt; and that no part of the foregoing sums had been in fact appropriated by them to the church. No agreement was ever made with the trustees by the defendant as to the annual sum which he should receive out of this trust fund. The trustees of another fund had also, from the year 1840 to 1845 (both inclusive), paid an annual sum of 11*l.* 10*s.* from the said trust fund to the minister of the church for the time being, for his salary as minister. The trustees of another fund had also, during another period, paid an annual sum of 31*l.* 10*s.* from the said last mentioned fund, being a specific gift to the minister of the church for the time being.

It was agreed that the Court might draw any conclusion of fact which the jury might have drawn. The question for the opinion of the Court was, whether the plaintiff was entitled to recover the whole or any part of the said sum of 150*l.* If the Court should be of opinion that he was entitled to recover, a verdict was to be entered for him for such amount as the Court should direct: if the Court should think that

the plaintiff was not entitled to recover any part of the 150*l.*, a nonsuit was to be entered.

The case was now argued.^(a)

*440] *Butt*, for the plaintiff.—The defendant will suggest; First, that the contract of September 25th, 1840, did not bind Millard and the plaintiff, and therefore the plaintiff paid in his own wrong. Secondly, that the contract of March 10, 1845, not showing a consideration, was invalid by the Statute of Frauds. But:

First, the letter signed by Steele and Millard in 1840 may be read as reciting a contract by Mr. Edwards to resign; and, if so, a good executory consideration appears. Secondly, the defendant's letter of March, 1845, shows a good consideration, namely, the plaintiff's "having resigned" his office of deacon. In *Thornton v. Jenyns*, 1 Man. & G. 166 (E. C. L. R. vol. 39), the Court of Common Pleas deemed it (on demurrer to a plea) a valid consideration for the defendant's promise that the plaintiff "had then promised;" holding that the promises might be construed as mutual and concurrent; and in *Payne v. Wilson*, 7 B. C. 423 (E. C. L. R. vol. 14), where the declaration alleged a promise in consideration that plaintiff "would consent" to suspend proceedings, and the contract proved was: Mr. R. P. "having" "consented to suspend proceedings," I promise; this Court held that an executory consideration was sufficiently proved. A like construction was adopted in *Dally v. Poolly*, 6 Q. B. 494 (E. C. L. R. vol. 51), and in *King v. Cole*, 2 Exch. 628.† [PATTESON, J.—In all those cases there is a manifest connexion between the thing to be done and the consideration; and the Court might infer a request from the party undertaking: here it is not easy, at least in the second contract, to trace such a connexion between the promise to pay and the resignation.] The resignation of Mr. Edwards was upon *441] a mutual *agreement between him and the then deacons to accept and to pay 5 per cent. interest half-yearly: so far, at least, the consideration between those parties had a prospective character, which continued till the 700*l.* was paid. Words suggestive of a request are necessary only where the consideration is manifestly a past one. The consideration here was not wholly past at the time of the promise, as in *Roscorla v. Thomas*, 3 Q. B. 234 (E. C. L. R. vol. 30).^(b) [PATTESON, J.—Does any benefit to the defendant, or detriment to the plaintiff, appear on the second contract?] Resigning the office of deacon is a detriment. [PATTESON, J.—That does not appear. ERLE, J.—You may perhaps put it, that, if the plaintiff had guaranteed a payment, and held an office which gave him command of funds, it was not likely that he would resign unless he were to be indemnified.] And when parties agree, one to resign, and the other to keep up payments of money, the Court cannot but see that the resignation is of some con-

(a) Before PATTESON, WIGHTMAN, and ERLE, Js. PATTESON, J., left the Court near the close of the argument for the plaintiff.

(b) See *West v. Jackson*, 16 Q. B. 280 (E. C. L. R. vol. 71).

tinuing value. [WIGHTMAN, J.—This mode of argument would remove the objection to almost any contract as made on a past consideration.] On the point of construction, *Butcher v. Steuart*, 11 M. & W. 857,† and *Goldshede v. Swan*, 1 Exch. 154,† are additional authorities for holding that the consideration here might be concurrent with the promise. If the second contract be an agreement to indemnify, it is not within sect. 4 of the Statute of Frauds, 29 C. 2, c. 3, according to *Thomas v. Cook*, 8 B. & C. 728 (E. C. L. R. vol. 15).

Watson, contrâ.—The defendant must succeed on the first plea; for the contract of September 25th is *distinctly on a past consid- [*442] eration, and no request appears: and, unless there was an agreement between Millard and Edwards and the plaintiff upon valid consideration, the plaintiff cannot recover on the contract between him and the defendant. [WIGHTMAN, J.—Giving up something which is of no real value may be a consideration; *Haigh v. Brooks*, 10 A. & E. 309 (E. C. L. R. vol. 37). (a)] The whole ground of this action is that the plaintiff paid money for which the defendant was responsible; if the original contract did not bind, there was no responsibility. As to the second agreement: the defendant's letter of March 10th, if amounting to a contract, was a contract to indemnify, and was required by the Statute of Frauds to be in writing; *Green v. Cresswell*, 10 A. & E. 453 (E. C. L. R. vol. 37) (b); therefore the writing which contained it should have specified a legal consideration: but the only consideration apparent is an executed one, without mention of a request. As to *Payne v. Wilson*, the consideration there was the plaintiff's "having" consented; but it was to something thereafter to be done; there were both a request and a continuing consideration. In *Dally v. Poolly*, the consideration was Mr. Belton's "having agreed" to something which was future. "Having agreed" was the form of words in *Tanner v. Moore*, 9 Q. B. 1 (E. C. L. R. vol. 58); but the thing to be done was future ("to stay all further proceedings at law"); and this Court held that the consideration was executory, and did not substantially vary from that stated in the declaration, which was *"agreeing to stay." The agreement was [*443] deemed to be "continuing" "until the action was actually stayed." [WIGHTMAN, J.—The term to "agree" implies something to be done.] In *Butcher v. Steuart*, the Court collected from the document and the evidence a promise to discharge the defendant from execution in consideration of the plaintiff's agreement. It appears that PARKE, B., would have entertained much doubt, if the case had rested solely on the memorandum. In *Thornton v. Jenyns* the question arose (on demurrers to plea and replication), whether the declaration sufficiently showed an executory consideration; and the Court thought that it did, the word "then," as it was there used, relating to the same

(a) Judgment affirmed in Exch. C.; *Brooks v. Haigh*, 10 A. & E. 323 (E. C. L. R. vol. 37).

(b) See *Eastwood v. Kenyon*, 11 A. & E. 438 (E. C. L. R. vol. 39).

period of time in the case of both the mutual promises. The question in *Goldshede v. Swan*, 1 Exch. 154,†(a) was whether evidence could be received to explain words in the written contract which seemed ambiguous; and the Court held the words sufficiently ambiguous to let in such proof; without it, the document would not, as it seems, have established an executory consideration. [ERLE, J.—If, on one construction, the contract would be valid, on another, void, the rule comes in that instruments should be construed *ut res valeat*.] Lord LYNDEHURST, C. B., said, in *Cole v. Dyer*, 1 Cro. & J. 461,† S. C. 1 Tyr. 304 (where an executory consideration was declared upon, but did not, as was contended, appear on the written instrument given in evidence); “If, in such a written agreement to be answerable for the debt of another person, two distinct considerations may, with equal probability, *444] be *inferred as the inducement for that engagement, the writing is not taken out of the operation of the Statute of Frauds, and consequently can give no right of action.” [ERLE, J.—It seems strong to say that the instrument shall be construed *ut res pereat*.] *King v. Cole*, 2 Exch. 628,† is a case, like *Goldshede v. Swan*, where the document was construed by the aid of accompanying circumstances, and held to show an executory consideration. In the present case there is no ambiguity which could render evidence admissible; nor, if there were, would the facts warrant the plaintiff’s view. (The argument as to the existence of funds, and lapse of a reasonable time, is omitted.)

Butt, in reply.—As to the first point: the objection, if any, is on the record, and ought not to be taken in the present form. But, as is stated in *Chitty on Contracts*, 451, c. 3, s. 2, 4th ed. (referring to several authorities), “If” “the consideration can be collected, or fairly and satisfactorily inferred from the memorandum, it is sufficient to satisfy the act” (29 C. 2, c. 3, s. 4): and that applies to the letter of September 25th, 1840. As to the second point: the letter of March 10th, 1845, is not ambiguous: but, if it were, extrinsic evidence may be used to explain it; and the resignation appears by the case to have been a consideration at least concurrent with the promise.

Cur. adv. vult.

PATTESON, J., in the same vacation (December 18th), delivered the judgment of the Court.

*445] “We think that the plaintiff is entitled to the verdict on all the issues.

As to the first: the instrument produced in evidence contains the effect of the agreement alleged in the declaration and denied by that issue; and the defect of consideration, if any, is shown on the record.

As to the second issue: we think that the words, in their ordinary acceptation, are capable of expressing either a past or a concurrent consideration: and, as upon one construction the instrument is void,

(a) See *Bainbridge v. Wade*, 16 Q. B. 89 (E. C. L. R. vol. 71).

the other is to be adopted which makes it valid. The expression, that a promise is founded upon a consideration, conveys the notion that the consideration precedes the promise in the mind of the party making the promise; he promises because the consideration exists; and this form of expression is shown by the authorities to have been frequently used when the consideration and the promise are concurrent. Each side of a contract is consideration or promise according to the party speaking of it: and, if each party were to put into writing his own promise, each side of the contract would in turn appear to have preceded the other, though both formed one agreement: the plaintiff might write "you having guaranteed, I resign;" and the defendant, "you having resigned, I guarantee." So are the authorities. In *Butcher v. Steuart*, 11 M. & W. 857,† the defendant wrote "you having released, I promise:" the evidence showed that the release had not been given when the promise was made, but was then agreed to. So is *King v. Cole*, and *Goldshede v. Swan*: and the language of Chief Justice TINDAL in *Thornton v. Jenyns* expresses very *clearly that the form of expression in [*446 question is capable of this construction. It seems to us to follow that this construction should be adopted, the presumption being that the parties did not intend that their act should be void. No extrinsic evidence is required for this construction; but such evidence would be requisite for the party alleging that the instrument ought to be held void.

As to the third issue, respecting the funds of the church, we think that funds for the support of the minister were intended to be included, and for that reason the former instrument stated in the case was required from the new minister at the time when the former minister resigned. The remaining issue related to the time: but, as we are of opinion that there were sufficient funds, it follows that a reasonable time for making payment had arrived. Judgment for plaintiff.

Where A. and B. gave a writing to the plaintiff as follows: "In consideration of your having endorsed the under-mentioned notes, drawn by S. and T. in your favour, we hereby hold ourselves accountable to you for them in the same manner as though said notes were drawn by us," it was held that the consideration was past and therefore insufficient: *Bulkeley v. Lander*, 2 Conn. 404; *Chaffee v. Thomas*, 7 Cow. 358.

ANN BROUGH v. EISENBERG. Dec. 7.

A *distringas* under stat. 2 & 3 W. 4, c. 39, s. 8 (see stat. 15 & 16 Vict. c. 76, ss. 17, 24), could not be issued for the purpose of compelling appearance while the defendant was abroad.

But a *distringas* for that purpose, obtained by the plaintiff without wilful deception upon the Court, while the defendant was abroad, was irregular only, and not a nullity; and the defendant might, by laches, disable himself from moving to set aside the process.

Plaintiff obtained (without intentional deception) a *distringas* to compel appearance, while defendant was abroad. Defendant had left England in September; the writ issued in December; appearance was entered, and proceedings were carried on to execution, defendant being

still abroad. The seizure took place in February. Defendant, in an affidavit made for the purpose of setting aside the proceedings, deposed that he first heard of the execution in March, when on his return to England, and that, having been delayed by illness, he did not arrive in London till June 2d. A week afterwards he moved (in term) to set the distringas and execution aside. It appeared, however, that he had arrived at Ostend on the 30th of April: and the interval between that time and June 2d was not conclusively accounted for. Held, that the motion was too late, and that the proceedings could not be disturbed.

SIR F. THESIGER, in last Trinity term (June 9th), obtained a rule nisi to rescind an order of WIGHTMAN, J., of December 22d, 1848, and *447] to set aside *the distringas and all subsequent proceedings in this cause. The following facts were stated on affidavit in support of the rule.

The defendant (who described himself as a chiropodist) at several times in 1847 and 1848 gave acceptances to the amount of 6500*l.* for the purpose of raising money, which was effected by an agent, Mr. Dimond, the defendant placing in the hands of the agent jewellery and other property sufficient (as he deposed) to cover the sums advanced. In September 1848 the defendant left England, as he was in the habit of doing for the winter months, to travel on the Continent. He had previously (as his affidavit stated) spoken on the subject of the acceptances to Dimond, who informed him that the holder consented not to take any proceeding upon them till defendant's return. The defendant's wife and family went abroad with him, but returned to England in November, and went to Tunbridge Wells, where they resided during the remaining time of defendant's absence. The defendant proceeded to Vienna and into Poland, whence he returned towards England; and, in the latter end of March (having been delayed by illness), he arrived at Dresden on his way to London. At Dresden he was informed, by a letter from his wife, that all his property had been sold under an execution. The defendant's affidavit stated that, on hearing this news, he "was taken suddenly ill, which thereupon delayed his arrival in London. That this deponent arrived in London on Saturday the 2d day of June, 1849, and, as soon as possible, instructed his attorney" to investigate the proceedings against him. While at Dresden he had sent Dimond (who at that time was with him on the Continent) to Lon- *448] don, to attend to *his affairs: but Dimond had written him word that nothing could be done till defendant himself arrived. On coming to London, defendant found that execution had in fact issued at the suit of the plaintiff in this cause, and a sale had taken place. The defendant's affidavit stated, further, that he is in solvent circumstances; that the income arising from his professional avocations is 5000*l.*; that he did not leave England, or continue absent, to avoid his creditors or any process or proceedings against him; that he never was served with any letter, writ, or other paper in the cause, nor did any ever come to his hands or knowledge, nor was he informed of any proceedings against him till he received the letter from his wife at

Dresden: and that he was "continually absent from England" from the time of his leaving it as before mentioned "until his said return on the 2d day of June, 1849." To confirm his statement as to the various stages of his journey, he annexed to his affidavit his passport from the Foreign Office in England: and he deposed "that all endorsements and writings on the said passport were respectively made by the authorities by whom they purport to have been made, and at the times when they purport to have been made." There were many visas annexed to the passport; the last purporting to be at Ostend; date 30th April, 1849.

It appeared that the writ of summons in this cause was issued on December, 12th, 1848, the plaintiff suing as endorsee of twelve bills of exchange and a note, respectively accepted and made by defendant, to the amount, altogether, of 6525*l*. The distringas issued on December, 23d, under the order of WIGHTMAN, J., of *December 22d; [*449 appearance was entered, and declaration filed, January 20th, 1849; interlocutory judgment signed for want of a plea, January 25th; and final judgment signed February 2d. The affidavit on which the order for the distringas was obtained had been sworn by a clerk to the plaintiff's attorney, and stated that the deponent had called at defendant's house on the 12th and two following days of December to serve the writ of summons, and had seen only a man servant, who said that the defendant was not at home, that he (the servant) did not know when his master would be at home or where he was to be met with, and that he (the servant) had no directions. The clerk further deposed, in that affidavit, "that, from inquiries that this deponent has made, and from the information that he this deponent has received, and from what he has heard and believes, this deponent saith that he has no doubt that the said defendant is evading service of process by absenting himself from home for that purpose, or by being denied to persons calling at his house to effect such service." The affidavit stated the other particulars requisite for obtaining a distringas. It did not in any way suggest that the defendant was absent from England.

There were further affidavits corroborating the material statements in that of the defendant, and tending to show that the proceedings to execution had been unnecessary, and adopted without any notice to the defendant's family or agent, and that the property had been sold at a rate far below its value. Dimond stated that, on arriving in London, and making inquiries as the defendant had directed, he was informed by solicitors that nothing could be done till defendant's return; [*450 and he (in the latter end of April as he believed) wrote to defendant to come home immediately. The defendant's servant deposed that, at the times mentioned in the affidavit for a distringas, he had told the person who called that defendant was on the Continent, having left London for Germany, and that deponent did not know when

he would return, nor where papers could be sent to him. The deponent also swore that he had given similar answers when other papers were subsequently delivered by the same person; that such papers were not in fact forwarded, Mr. Dimond as well as the defendant being abroad, and defendant's address not known; and that deponent showed the papers to plaintiff's attorney when the levy was made, and told him that they had never been transmitted, deponent not knowing the defendant's address. The deponent also stated that he never mentioned the receipt of the papers to defendant's wife, whose address he did not know till about the time of the execution. The plaintiff's attorney, John Brough, was the endorser of the bills and note to the plaintiff (his sister); and he knew, in September, 1848, of the defendant's intended journey on the Continent.

Affidavits were sworn in answer, impeaching the characters and testimony of the defendant and Dimond, and contradicting the affidavits in support of the rule on various points, particularly, as to the solvency of the defendant, the transactions between him, Dimond and John Brough, and the words and conduct of the man servant at the time of the execution; the clerk who served the writ of summons denying that the servant had said anything of his master being on the Continent. The affidavits also stated that the defendant, when about to leave England, had led John *Brough to believe that he would not be *451] absent more than a month: that Mr. Brough had been informed, early in December, 1848, by a Mr. Hooper, and believed, that the defendant had actually returned, and similar statements were made at Brough's office by another party in the same month, with the addition that he was keeping out of the way of that party, who was his creditor. That, in the same month, the clerk who served the writ of summons had made inquiries in the neighbourhood of Isleworth, where defendant had a house, and had received information, which he reported to Mr. Brough, that defendant was concealing himself from his creditors. Hooper himself stated his belief that the defendant had gone to England when his family returned from the continent in 1848; and he deposed that, in January, 1849, he wrote from France to John Brough, that the defendant was then in England. The clerk who served the summons deposed that, on 12th December, 1848, the house where he served it had the appearance of being occupied in the usual way. And the keeper of a lodging-house at Tunbridge Wells, in which the defendant's wife and family resided for some weeks in the spring of 1849, deposed that, on May 3d, they left her house and told her they were going to Isleworth.

In the last term, (a)

Sir *J. Jervis*, Attorney-general, *Martin*, and *Lush* showed cause.—The distringas will, no doubt, be set aside, if it was obtained by a wilful

(a) November 22d and 23d. Before PATTERSON, COLERIDGE, and WIGHTMAN, Js.

deception upon the Court; but there is no ground for such a proceeding if the Court has not been intentionally *misled. It has been supposed that there is a distinction in practice between a dis- [452] stringas for the purpose of outlawry and a disstringas to compel appearance; that the first may be obtained when the party is abroad, the other not. But there is no ground in law for the distinction. [COLERIDGE, J.—The practice seems extraordinary; but it certainly has prevailed.] If it is merely a practice, and unsupported by stat. 2 & 3 W. 4, c. 39, s. 3, (a) it may fitly be changed. And it appears by the text books that the Courts have not, before or since the statute, made it an invariable rule to set aside a disstringas to compel appearance, merely because the defendant was abroad when it was served; 1 Tidd, 112, 9th ed., 1 Chitt. Archb. 182, 8th ed. As was said by TINDAL, C. J., in *Toms v. Nash*, 2 Scott's New Rep. 598, 601, a motion of this kind "is not to be looked at as if it were an original application to the Court for leave to issue a disstringas: it is for the defendant, who seeks to set it aside, to satisfy the Court that the writ ought never to have issued." In *Norman v. Winter*, 4 New Ca. 637, the Court did not set aside, but refused a disstringas, because it was not shown that the defendant was not abroad. In *Partridge v. Wallbank*, 2 M. & W. 893,† the judgment, after disstringas, was set aside because the defendant was abroad when the disstringas issued: the order for a disstringas was in general terms; and the objection was that, under such an order, the plaintiff could not take his choice of proceeding to outlawry or compelling appearance. (b) In *Esdaile v. *Marshall*, 4 New Ca. 172, [453] which may also be cited for the defendant, the objection which prevailed was to the generality of the affidavit. Supposing the writ to have been improperly issued (without fraud upon the Court), it is only an irregularity, and has been waived by laches. The present motion was made on June 9th: it appears by the defendant's passport that he was at Ostend on April 30th; he was then on his return to England; his affidavit states that he "arrived in London" on the 2d of June; but it is clear that he might have been there in time to take earlier proceedings. Even if he came to England in vacation, he was bound to make application to a Judge at Chambers; *Cox v. Tullock*, 2 Dowl. P. C. 47.

Counsel then discussed the facts of the case to show, first, the probability that the defendant was not absent from England during the whole time from September to June, and, secondly, that if he was so, no intentional misrepresentation had been made to obtain the disstringas.

Sir F. Thesiger, Whateley, Cockburn, and Bramwell, contra.—This is a case of wilful deception on the Court; but, even if it were not so,

(a) See now stat. 15 & 16 Vict. c. 76, ss. 17, 24.

(b) See *Fraser v. Case*, 9 Bing. 444 (E. C. L. R. vol. 23).

the *distringas* was a nullity. The Courts have constantly maintained the distinction between a *distringas* to compel appearance and *distringas* for the purpose of outlawry, and held the writ invalid when obtained for the former purpose while the defendant was abroad; *Frazer v. Case*, 9 Bing. 464, *Vere v. Gowar*, 3 New Ca. 503, *Partridge v. Wallbank*, *454] **Esdaile v. Marshall*, *White v. Johnson*, 1 Gale, Exch. Rep. 108. In one case, *Moon v. Thynne*, 8 Dowl. P. C. 153, a *distringas* to compel appearance was granted, it being sworn that the defendant was gone abroad to avoid his creditors; but there is no subsequent decision to the same effect. [COLERIDGE, J., mentioned *Evans v. Fry*, 3 Dowl. P. C. 581.] There it was merely decided that the writ could not be granted against a party abroad on an affidavit not stating an intention to avoid creditors. The same rule was followed in *Simpson v. Lord Graves*, 2 Dowl. P. C. 10, and *Grover v. Hindmarsh*, 7 Dowl. P. C. 607. [COLERIDGE, J.—It may not be sufficient for your purpose that a *distringas* while the party was abroad has been held irregular: you must show that it is null. The cases seem consistent with either supposition.] The party's residence in England is so material to the jurisdiction that affidavits for a *distringas* to compel appearance have been held insufficient which omitted to state a belief that the party was not abroad; *Esdaile v. Marshall*, *Norman v. Winter*. The authorities showing what is an irregularity and what is a nullity are collected in 2 Chitt. Archb. 1268—1270, 8th ed.; and it is said: "Where the proceeding adopted is that prescribed by the practice of the Court, and the error is merely in the manner of taking it, such an error is an irregularity, and may be waived by the laches or subsequent acts of the opposite party; but where" "the proceeding itself is altogether unwarranted, and different from that which, if any, ought to have been taken, then *455] the proceeding is a nullity, and cannot *be waived." "If a judge make an order for an arrest, under the 1 & 2 Vict. c. 110, which he is not authorized in making, it seems a writ issued under it is a nullity, and the sheriff is not bound to make any return to it." [WIGHTMAN, J.—In the last instance there would be a want of jurisdiction apparent. That is not so on the face of the present proceedings.] The Court here had authority to issue the writ; but the process was put in motion by a party who had no right to call for it under the circumstances; there is no informality of process, but a substantial defect. [WIGHTMAN, J.—The jurisdiction is, to order a *distringas*; whether the case is within the jurisdiction for the purpose of compelling appearance, or only for the purpose of outlawry, the writ is the same; there is merely a difference in the notice.(a) COLERIDGE, J.—A writ of summons served in a wrong county is not a nullity; the defendant must move promptly to set it aside.] The process may be null, in practice, though not so far a nullity as to be no protection to the officer

(a) Stat. 2 & 3 W. 4, c. 39, Sched. No. 3.

or party using it. To authorize entering an appearance for the defendant, it must be shown that the process has been brought directly to his notice. "The *distringas* is intended for cases where it cannot be so shown, but where it may be reasonably inferred that the defendant knows that an action has been brought against him, so that he might appear thereto if he would. It is in its nature penal, and is founded on a constructive contempt of the Court. Both the statute and the notice appended to the writ assume that the defendant is aware of the action:" Lush's Pract. 669. *Where the facts are such that this cannot be shown, there is such an irregularity as makes the issuing of the process a thing unwarranted; and the process issued is, for the practical purpose, a nullity. If this be so, or if the *distringas* was obtained by deception, and not with a reasonable and *bonâ fide* belief that the defendant was in England, the question of laches is immaterial. [*456]

The defendant's counsel discussed also the facts appearing on affidavit. [PATTESON, J.—The question whether this is irregularity or not is of considerable importance: we will take time to look into it.]

Cur. adv. vult.

PATTESON, J., now delivered judgment.

In this case we are satisfied that, on the 12th, 13th, and 14th of December, 1848, when calls were made for the purpose of serving the writ of summons, the defendant was abroad. The writ of *distringas* ought, therefore, to have been in order to proceed to outlawry, and not in order to compel appearance; and, being for the latter purpose, and so acted on, was irregular according to the case of *Partridge v. Wallbank*, 2 M. & W. 893,† and other cases.

The affidavit, however, on which the *distringas* was obtained, stated the belief of the deponent that the defendant was keeping out of the way to avoid process; and it is contended that this was a deception and fraud practised upon the learned Judge who ordered the writ. We are of opinion that there was no deception practised. The defendant had gone abroad in September; *but there was good reason to believe that he would return after no long period, and that he had returned in December. His wife and servants had returned, and were at Tunbridge Wells; and the plaintiff's attorney (who is in truth the real plaintiff, suing in the name of his sister as endorsee of bills of exchange) was informed by a person in France, whom he had good reason to credit, that the defendant himself had returned. [*457]

The *distringas* being returned *Nulla bona* and *Non est inventus*, an appearance was entered by order of a Judge, and regular proceedings taken to judgment and execution, under which the defendant's goods were seized in the month of February, 1849, the defendant being still abroad. He swears that he did not hear of this until he was informed of it by a letter from his wife, which reached him at Dresden in the

month of March; that he was too ill to come home directly; and that he did not reach "London" till June 2d; that he then made inquiries and instructed an attorney; and this rule to set aside the proceedings was obtained on the 9th of June. But it appears by his passport, which he has put in as part of his case, that he arrived at Ostend on the 30th of April; and he does not at all account for the time between that day and the 2d June. His wife also swears that she remained at Tunbridge Wells till his return to England; and it is shown by the affidavits of persons there that she quitted Tunbridge Wells about the 2d of May, saying she was going to Isleworth, where the defendant had a house. There seems, therefore, to be much reason to believe that, although the defendant might not reach "London" till the 2d of June, yet that he might be in England a month sooner: at all events *458] he was at Ostend in his way to England on the 30th of April, and knew then and had known some time before, of the execution and sale under it; so that there was abundance of time for him to have instructed an attorney to take proceedings for the purpose of setting aside this execution, at least a month before such proceedings were taken.

Under all these circumstances, we think that the obtaining the distringas was matter of irregularity only, and that the defendant was too late in the steps he took.

Much matter appears on the affidavits as to the nature of the transactions between the parties, and the conduct both of the real plaintiff and of the defendant, and other parties connected with them, upon which we do not think it necessary to make any observations, as they do not form the grounds of the decision at which we have arrived, that this case is one of irregularity only, and that the application is too late.

The rule must be discharged with costs.

Rule discharged, with costs.

The QUEEN v. The Inhabitants of CHEDGRAVE. Dec. 7.
Reported, 12 Q. B. 206 (E. C. L. R. vol. 64).

***The QUEEN v. The TITHE COMMISSIONERS for ENGLAND and WALES. Dec. 18. [*459]**

(In the Matter of GREAT HALE TITHES.)

Stat. 5 & 6 Vict. c. 54, s. 7, enacts that, when the Tithe Commissioners are preparing their award under stat. 6 & 7 W. 4, c. 71, if any agreement for commutation of tithe, &c., shall, previously to that Act, have been made, which is not of legal validity, but appears to the Commissioners to give a fair equivalent for the tithe, &c., they *shall be empowered* to confirm such agreement; and, if the equivalent be not fair, they shall nevertheless *be empowered* to confirm, and to award such rent-charge as will make up a proper equivalent, and, subject to such confirmation and award, to extinguish the right to tithe.

Held that this clause is imperative, and not merely permissive, if the agreement be such in its nature and circumstances as the clause was meant to comprehend.

An agreement was made in 1697, between the impropriator of a parsonage, the vicar, and certain landowners of the parish, whereby the tithes and glebe were commuted for allotments of land and annual payments. Some of the landowners, parties to the agreement, refusing to fulfil it, the others filed a bill of equity against them, and, on their submission, a decree was made in 1699, confirming the agreement. In 1707 an additional agreement was made, for a further yearly payment to the vicar, in lieu of small tithes. The agreements were not in themselves legally valid, for want of proper parties, and from other defects. Allotments were made and accepted, and the annual payments rendered and received, down to 1812. A vicar was inducted in 1796, and received his stipulated payment down to 1811, in ignorance of its origin, which he then discovered, and thereupon immediately gave the landowners notice of determining such payment. Part of the land allotted to him in lieu of tithe had never come to his possession; the rest he offered to give up. On the expiration of his notice, he filed a bill against certain of the landowners for subtraction of tithe, praying an account. They alleged in defence the decree of 1699, the agreement of 1707, and the subsequent performance; but an account was decreed, and the defendants then paid five years' arrear of tithe. In 1819 the impropriator filed a bill against the vicar; in that suit the agreements were relied upon and disputed, and the bill was dismissed by a decree, which was confirmed on appeal. A tenant of the impropriators, who had withheld his tithe while these proceedings were pending, then paid his arrears to the vicar. Neither of the agreements was acted upon, so far as they related to the vicar, after 1812.

Held on mandamus, and demurrer to return, that agreements so circumstanced were not such as the Legislature, in stat. 5 & 6 Vict. c. 54, s. 7, intended the Commissioners to confirm, and that, to a mandamus requiring them so to do, the above facts were a sufficient answer.

The mandamus required the Commissioners to confirm the agreements, and also to decide certain suits, and adjudicate on certain questions relative to claims of tithe by the impropriator and vicar. Held that the mandamus, being bad as to the confirmation, was invalid altogether.

MANDAMUS. The writ recited that, before and at the time of the making the agreements after mentioned, there were belonging to and in the parish of Great Hale, in Lincolnshire, divers, to wit, 10,000 acres of common fields, &c., and waste, and 10,000 acres of old enclosed lands; and Ebenezer Cawdron was owner *of the impropriate [*460] parsonage of Great Hale, and of divers lands in that parish; and Benjamin Deakon, clerk, was vicar of the said parish, and, as such vicar, entitled to some glebe lands in the said unenclosed lands, and to have some small tithes arising thereout. And that Sir Edward Hussey, of, &c., baronet, who was owner of the manors of North Hall and West Hall, in Great Hale aforesaid, and of divers lands and tenements in G. H. aforesaid, Robert Cawdron, who was owner of the manor of East Hall, in G. H. aforesaid, and of divers lands and tenements in G. H. aforesaid, the said Ebenezer Cawdron, and the said several persons

hereinafter mentioned who were severally seised and interested of and in several messuages, lands, and tenements in G. H. aforesaid, and in the fields, meadows, fens, parish, and precincts thereof, viz. Sir Thomas Willoughby, &c. (naming several others, some of whom were infants acting by their respective guardians), judging that it would be beneficial and advantageous to them to have the said unenclosed lands severed, plotted, and divided, the greatest part of the said lands and grounds then lying promiscuously, and the landowners suffering great losses and inconveniences by reason of the scarcity of enclosure, to the end that every of them should have his proportionable share, &c., that so they and their heirs and assigns might respectively for ever thereafter, according to their respective estates, &c., hold the same in severalty, freed and discharged of all commons, tithes, and other duties to be had or claimed by any other landowner otherwise than in the articles hereinafter mentioned was expressed, did, by articles of agreement in writing dated 16th September, 1697, and by certain other agreements, consent that an enclosure should be *461] made of all common fields, meadows, common fens, and waste grounds of and belonging to G. H. aforesaid: And it was thereby agreed and consented to by all the said persons that they and their heirs and assigns should respectively for ever, according to their several and respective estates and interests, hold the same grounds and plots respectively plotted and allotted to them in severalty, freed and discharged of all commons, tithes, and other duties to be had or claimed by the said Ebenezer Cawdron, impropiator of the said parsonage of G. H. aforesaid, his heirs and assigns, or by the said Benjamin Deakon and his successors, vicars of G. H. aforesaid, or by any owner of lands in the said parish; reserving only to Sir E. Hussey and R. Cawdon, their heirs and assigns respectively, respective lords of the said manors, their accustomed rents, services, &c. And it was thereby further agreed by all the said persons that 1s. per annum should be paid to the impropiators for every acre of old enclosures in the parish by the persons thereafter named, their heirs and assigns, for their respective shares thereof, and in such proportions as was after expressed. The writ further recited that, in pursuance of the said articles and agreements, the unenclosed grounds were surveyed, &c., and allotments therefrom (amounting to 380 acres) made to E. Cawdron as the impropiator; that he accepted the same, and took possession; and the lands have thenceforth hitherto been held by him, his heirs and assigns. That, in pursuance of the said articles and agreements, there was allotted to Deakon, as vicar, one plot or parcel of ground called Preacher's Plot, containing by estimation 23A. 0R. 23P., to be held and enjoyed by the said Deakon and his successors, vicars of Great Hale aforesaid, in lieu *462] and full *satisfaction of all tithes due or payable from or out of, or growing, arising, or renewing within, the said fields, meadows,

fens, commons, and wastes so agreed to be enclosed as aforesaid, and in lieu of the said vicar's right of common in the said places for ever: and there were further allotted, &c., to Deakon and his successors, vicars, &c., for ever, for glebe, divers other plots or pieces of ground amounting together to 30A. 0R. 15P.; and Deakon accepted the said plots, &c., in lieu of such tithes and for glebe, and took possession thereof; and that he and his successors, as such vicars, have thenceforth hitherto possessed and enjoyed, and the Rev. Richard Bingham, clerk, the present vicar, still possesses and enjoys, the said Preacher's Plot and the said other pieces of ground so allotted to him as aforesaid. The writ stated also the allotment of other parcels of unenclosed land to the other persons, parties to the agreement, according to their respective interests, and acceptance and possession by them; and that, from lapse of time, &c., the lands could not be restored to their former state. It then proceeded:

And whereas we have been given to understand, &c., that the tithe of wool and lamb is a rectorial tithe and not a vicarial tithe, and is included in the composition of 1s. per acre per annum for the old enclosures, and that the said sum of 1s. per annum hath yearly and every year, from the time of making the said articles of agreement hitherto, been paid to the said Ebenezer Cawdron, his heirs and assigns, impropiators, &c., for every acre of old enclosure in the said parish by the landowners in the said articles of agreement named, their heirs and assigns, for their respective shares thereof, and in such proportions as therein expressed, and that no tithes in kind have ever be paid in respect of the said lands *for which the said sum of 1s. per acre has been payable as aforesaid, either to the impropiator in the said articles mentioned or to the impropiator for the time being, or to any person claiming by, through, or under them: And whereas, &c.: the writ then recited that a bill in Chancery was filed, June 7th, 1699, by all the parties to the above agreement, except four of the allottees of the last-mentioned parcels (namely, Richard Baxter, John Slann, Richard Booth, and Richard Wiltshire), complaining that those four parties refused to perform the agreement, and praying that the same might be confirmed: That the four last-mentioned parties, by their answers, submitted to the making of a decree as prayed; and thereupon, on 10th November, 1699, Lord EVESHAM, then Chancellor, decreed that the agreement should be performed, and that the complainants and defendants should hold and enjoy the several lands in their several lots contained accordingly. [*463]

The writ then stated that, in 1707, the then vicar being dissatisfied with the agreement of 1697, a certain other agreement was entered into between the then landowners and the vicar, by which a composition of 1½d. per acre per annum was to be paid to the vicar in lieu of all small tithes throughout the parish: and that the said composition of

1½d. per acre has been paid to and received by the successive vicars in lieu of all small tithes as aforesaid, until in or about A. D. 1812: And, although, in or about the year 1820, certain payments were made by some of the landowners of Great Hale to the now vicar, which included the tithe of wool and lamb, yet no general payment in respect of such last-mentioned tithes has ever been made either to the said vicar or to any preceding vicar of the said parish.

*464] The writ proceeded to recite that in 1832 the said *Richard Bingham, then and still vicar of the said parish, filed his bill in equity in the Exchequer against four occupiers of a part of the parish for tithes of wool and lamb; that they put in their answers denying liability; and that the bill is pending and undetermined. And that, in 1844, the said Richard Bingham, as such vicar, filed another bill in the Court of Chancery, against other persons, being the whole or nearly the whole of the occupiers of land in the said parish, for the recovering of the said tithes, which last-mentioned suit is still pending and undetermined. "And whereas we have also been given to understand," &c., "that no binding or valid agreement in law for the commutation for a rent-charge of the tithes of the said parish of Great Hale hath at any time been made or entered into: And whereas," &c.: the writ then recited that proceedings had been taken under stat. 6 & 7 W. 4, c. 71, for a commutation of the tithes of Great Hale; and that, at a meeting, 14th April, 1843, before an Assistant Tithe Commissioner, the landowners of Great Hale "claimed, under and by virtue of the said agreements, to be exempted from and not liable to the payment of tithes of wool and lamb in respect of the said lands enclosed under the said agreement, and also to be exempted from and not liable to the payment of the tithes of wool and lamb, and other rectorial tithes, upon payment to the impropiator of the said sum of 1s. per acre in respect of the said old enclosed lands of the said parish; which said several claims were then and there denied by the said R. Bingham, clerk; and that such claims then became and were matters in difference whereby the making of the award was hindered and delayed: That the Commissioners did not, by themselves or the Assistant Tithe Commissioner, determine the said matters: And that, *465] at *a meeting before an Assistant Tithe Commissioner, 7th October, 1844, the draft of an intended award was objected to by the last-mentioned landowners, on the ground that it awarded tithes to be payable contrary to the said agreement of 1697, whereas the Commissioners ought to have confirmed and rendered valid the said agreement, and discharged the lands from tithe agreeably thereto and to stat. 5 & 6 Vict. c. 54.(a) It was also objected in like manner, that the agreements

(a) Stat. 5 & 6 Vict. c. 54, s. 7, enacts: "That where any agreement shall have been made before the passing of the first recited act" (6 & 7 W. 4, c. 71) "for giving land or money, or both, instead of tithes or glebe or commonable or other rights or easements, which is not of legal validity, and such lands or money, or both, shall appear to the Commissioners to be a fair equivalent for the said tithes or glebe, or rights or easements, they shall be empowered to confirm

for 1s. and 1½d. per acre were not confirmed: And the said landowners required the Assistant Commissioner to confirm the agreement of 1697, discharge the lands from tithes as thereby provided, and amend the award in respect thereof; and to confirm the agreement for 1s. and 1½d.: But that the Commissioners had not, by themselves or the Assistant Commissioner, confirmed the agreements or either of them, or amended the award. That the said landowners, on 27th May, 1844, made the same demands by a claim or notice in writing, whereby they also gave notice that the owners of all the old *enclosed lands in the said parish claimed and insisted upon an exemption from all great tithes and the tithes of wool and lamb, and if not tithe free, then subject only to the payment of 1s. per acre in lieu of such great tithes and tithe of wool and lamb: And that the owners of all the newly enclosed lands in the said parish claimed an exemption from all great tithes and from the tithes of wool and lamb arising from or in respect of those lands, and exemption from all other tithes arising from or in respect of those lands; or did claim and insist that 1½d. per acre per annum is payable to the vicar for and in lieu of all such other tithes last mentioned, arising from or in respect of such lands, by virtue of the said agreement of 1697, or some subsequent agreement or otherwise: And the owners of such last-mentioned lands claimed and insisted that at all events they are exempt from payment or render of any great tithes to the lay rector or any other person, and did thereby call upon and require the Commissioners, on behalf of the owners of all the said lands, both old and new enclosure, to decide the said question before making their award; and did thereby require them to take notice that there was a suit pending touching the right to the tithes of lamb and wool, and a question touching the existence of a composition real and customary payment, and a claim of exemption from and non-liability to the payment of tithes of lamb and wool in respect of the old and new enclosed lands; and did thereby require the Commissioners to decide as aforesaid, and to appoint a time and place for hearing and determining, &c. The writ then stated that the Commissioners, though a reasonable time had elapsed, neglected and refused to proceed as after mentioned. It therefore commanded them:

*“To confirm and render valid the said agreements, and to decide and determine the said suits and differences now pending, and to decide and determine whether the said new enclosed lands are

and render valid such agreement; and in case the same shall not appear to be a fair equivalent, the said Commissioners shall nevertheless be empowered to confirm such agreement, and also to make an award for such rent-charge, which with the said land or money, or both, will be a fair equivalent for the said tithes or glebe, or rights or easements, and, subject to such confirmation and award, to extinguish the right of the tithe owners to the perception of the said tithes, or his title to the said glebe rights or easements, or to the receipt of any rent-charge instead thereof, other than the rent-charge awarded over and above the lands or money, or both, so confirmed to them.”

discharged from payment of all manner of great tithes and the tithes of lamb and wool; and also whether the same new enclosed lands are discharged from the payment of all tithes to the vicar by payment of a modus or composition or annual payment of $1\frac{1}{2}d.$ per acre per annum or otherwise; and to decide and determine whether the said old enclosed lands are discharged from payment of all great tithes and the tithes of lamb and wool by payment of a modus or composition or annual payment of $1s.$ per acre per annum; and whether the said old enclosures are discharged of the payment of all tithes to the vicar by payment of the said modus, composition, or annual payment of $1\frac{1}{2}d.$ per acre:" Or to show cause, &c.

The return began by stating that, under the agreement stated in the writ, except that of 1707, the unenclosed grounds were surveyed, &c., and 380 acres allotted to Ebenezer Cawdron as impropiator, and accepted and from thence hitherto possessed by him, his heirs or assigns; and that, under the said agreements, except that of 1707, the $1s.$ per annum for every acre of old enclosures has been paid to E. C., his heirs, &c., impropiators, &c., by the landowners in the articles of agreement mentioned, in the proportions there expressed; and that, from the time of making the said agreements hitherto, no tithes in kind have ever been paid to the impropiator for the lands in respect of which the $1s.$ per acre has been payable. "That the said Richard Bingham was inducted into the vicarage" "in A. D. 1796; and that he *468] never has been in possession of or *received the rents or profits of, or enjoyed, all the lands allotted to the vicar for the time being by the said agreement" of 1697: "that is to say, he has not, from the time that he was so inducted into the said vicarage hitherto, been in possession of, or received the rents or profits of, or in any way enjoyed, so much land by 23 acres as is in the said writ alleged to have been allotted to the said vicar; and that the said R. Bingham received the said sum of $1\frac{1}{2}d.$ per acre per annum under the said agreement" of 1707, "in lieu of all small tithes until A. D. 1811, being, during all that time, in ignorance of the origin of such payment; and that, in consequence of divers of the landowners and occupiers of the said parish refusing to pay the said sum of $1\frac{1}{2}d.$ per acre per annum to the said R. Bingham, he was led to discover the same, and then gave notice to the landowners and occupiers of land of the said parish of his abandonment and determination of such payment of $1\frac{1}{2}d.$ per acre per annum in lieu of all the small tithes of the said parish, and of all other compositions whatsoever, and of his determination thenceforth to insist upon the payment of the same tithes in kind, and then offered to give up any lands which were then held by him as such vicar as aforesaid in lieu of such tithes or any of them: And the said R. Bingham has, from the time of his making such offer hitherto, been, and now is, ready and willing to give up all such lands: of all which the landowners

for the time being of the said parish have during all the time aforesaid had notice."

The return then set forth proceedings in equity, which it will be sufficient to state, as they appear by the judgment of the Court in the present case, as follows :

"It further appears that the vicar, on the expiration of his notice in 1812, filed two bills for subtraction of tithes, (a) against [*469 several occupiers of lands, and prayed an account; (b) in their answer to which the defendants admitted the fact of non-payment in kind, and relied on the conjoint effect of the first agreement, which had been confirmed by a decree of the Court of Chancery in 1699, and of the second agreement of 1707, and the subsequent enjoyment: that the account, (c) however, was decreed; and that, under it, in 1817, all the defendants but one Dawson, the tenant of one of the improPRIATORS, Sir George Farrant, had paid five years' arrears of the tithes claimed by the vicar. His non-payment is explained by the fact that the improPRIATORS, Sir George and Thomas Farrant, claimed the tithes of lambs and wool as against the vicar, and, to enforce this, in 1819, filed their bill against him, praying that they might be declared so entitled, and against an occupier, one Fountain, for an account. In his answer to this bill the vicar again stated and repudiated the agreements; and this bill, in 1821, as well as a supplemental bill by Dawson in the same year, was dismissed. Dawson appealed against the decree; and it was confirmed; after which Dawson paid the arrears. The return then states that neither of the agreements, *so far as they related to the vicar, [*470 had been acted on since the filing of the bill in 1812."

The return concluded: "Wherefore, we the said Tithe Commissioners," &c., "considering that the said decrees established the principle that the tithes of lambs and wool arising in the said parish, were payable to the vicar thereof in kind, and that neither the rector nor any other person whatsoever, other than the vicar, had ever any title to the said tithes of lambs and wool, and because we considered that the said decree established the principle that the said agreement of 1697, so far as it related to the vicar, and the said other agreements, were thenceforth to be treated as null and void, to all intents and purposes, have not confirmed," &c. (stating non-compliance with the several directions of the writ).

Demurrer, assigning numerous causes. The material questions will appear sufficiently by the judgment of the Court. Joinder.

(a) The return added, "and amongst others, of the tithes of lamb and wool."

(b) It appeared by proceedings set out on the return that the plaintiff denied that the composition of 1697 and the decree of 1699 were binding on the successors of Deakon, or that the allotment of land to the vicar sanctioned by the decree of 1699 was a fair satisfaction.

(c) Of the single value of the tithes of lambs, wool, agistment, and of all other small tithes whatsoever, which the defendants had respectively had and taken from their said farms, &c., within the parish of Great Hale and the titheable places thereof, since 25th March, 1813.

The demurrer was argued in Michaelmas vacation, November 8th and 11th, 1848.(a)

Whitehurst, for the Crown, contended: First: that the decree in equity of 1817 was not (as would be argued on the other side) a decision "by competent authority," and obligatory on the Commissioners, under stat. 6 & 7 W. 4, c. 71, s. 44: but that, if it were so, they still ought to determine the questions mentioned in the mandatory part of the writ, though they should do so in mere accordance with the decree. The result of the case makes a further report on this point unnecessary.

Secondly: assuming that the agreement of 1697 was *originally invalid (not being by deed, the ordinary not being party, and several of the parties being infants), he contended that, in justice, and in furtherance of the objects of stat. 6 & 7 W. 4, c. 71, the agreement ought to be confirmed under the power given by stat. 5 & 6 Vict. c. 54, s. 7; and he cited *Thorpe v. Plowden*, 14 M. & W. 520,† and *Plowden v. Thorpe*, 7 Cl. & Fin. 137. And further, he contended that, if this view were correct, the empowering words of stat. 5 & 6 Vict. c. 54, s. 7, must be read as imperative; *Roles v. Rosewell*, 5 T. R. 538, *Hardy v. Bern*, 5 T. R. 540, 636, *Rex v. Barlow*, 2 Salk. 609, *Rex v. The Steward, &c., of Havering atte Bower*, 5 B. & Ald. 691 (E. C. L. R. vol. 7), *Rex v. The Mayor and Jurats of Hastings*, 5 B. & Ald. 692, note (a) (E. C. L. R. vol. 7), *Backwell's Case*, 1 Vern. 152, *Regina v. St. Saviour's, Southwark*, 7 A. & E. 925 (E. C. L. R. vol. 34): and the Court would, for the public benefit, make the requisition effectual, by mandamus; *Rex v. The Severn and Wye Railway Company*, 2 B. & Ald. 646.

Peacock, contra.—Even if the words of stat. 5 & 6 Vict. c. 54, s. 7, be compulsory, the Commissioners have an alternative, namely, to confirm the agreement as made, or to confirm it with an award making the equivalent for tithe, &c., more equitable. This mandamus requires them absolutely to confirm. [COLERIDGE, J.—If they confirmed with an award of additional compensation, would not that be an obedience to the writ?] They are empowered to confirm, if they think the equivalent a fair one; if they do not, power is given *them to confirm with the addition of a new award; but provisions so worded cannot be held compulsory: and many practical difficulties would arise from allowing that effect to them in a case like the present. (He then discussed these with reference to the facts shown on the pleadings.) Under stat. 6 & 7 W. 4, c. 71, s. 45, which renders it "lawful" for the Commissioners to determine matters that hinder the making of an award, Lord ABINGER was of opinion that they had a discretion, to proceed or not; *Wetherell v. Weighill*, 3 Y. & Coll. Exch. Eq. 243; and stat. 5 & 6 Vict. c. 54, s. 7, must be construed in the

(a) Before Lord DENMAN, C. J., COLERIDGE, WIGHTMAN, and ERLE, Js.

same manner. The return shows a clear adjudication upon the right in the suits of 1819, 1821, after which it is impossible to demand that the old agreement should be confirmed.

If, upon this point alone, the writ cannot legally be enforced, it is void altogether. The Court can mould the rule for a mandamus, but not the writ itself; *Rex v. The Church Trustees of St. Pancras*, 3 A. & E. 535 (E. C. L. R. vol. 80). The same rule was acted upon in *York and North Midland Railway Company v. The Queen*, (a) on the prosecution of *Sir William Mordaunt Milner, Bart. A peremptory [*478 mandamus must be in the same form as the mandamus originally awarded; *Mayor of London v. The Queen*, 18 Q. B. 30, 41 (E. C. L. R. vol. 66).

Whitehurst, in reply, suggested that the rule might be different where the writ related to distinct and separable subject-matters; and he referred to *Regina v. Ellis and Greenwood*, Bail Court, 2 Dowl. N. S. 361, 374. [COLERIDGE, J., mentioned *Rex v. The City of Chester*, 5 Mod. 10.] *Cur. adv. vult.*

COLERIDGE, J., now delivered judgment.

This was a mandamus to the Tithe Commissioners: and the case was argued, upon a demurrer to the return, before Lord DENMAN, C. J., my brothers WIGHTMAN and ERLE, and myself, in Michaelmas term, 1848. By the writ the defendants were commanded:—1. To confirm certain agreements hereinafter mentioned. 2. To decide certain pending suits. 3. To decide whether certain lands in Hale Magna, in the writ called New enclosed lands, were discharged from payment of great tithe and the tithe of lambs and wool, and from the payment of all tithe to the vicar, by a modus or annual *payment of 1½d. per acre, or otherwise. 4. To decide whether certain lands, in the writ called Old [*474 enclosed lands, were discharged from the payment of all great tithes and the tithes of lambs and wool by a modus or annual payment of 1s.

(a) Exchequer Chamber, Trinity Vacation (June 13th), 1846. A mandamus had issued to the Company, founded on a clause in their special Act (6 & 7 W. 4, c. lxxxii., local and personal, public) which required them to make proper watering places for cattle in all cases where, by means of the railway, the cattle of neighbouring landowners should be deprived of access to their ancient watering places; and to supply the same at all times with water. The writ recited that by means of the railway the ancient watering places on certain specified closes had been made inaccessible to the cattle of the landowners; and it commanded the Company to make several new watering places on certain specified portions respectively of the said closes (as they had been requested to do by the owner and occupiers of the said closes), and to supply the same, when made, at all times with water. On return, traverse, and demurrer, the Court of Queen's Bench, in Trinity term (June 3d), 1846, awarded a peremptory mandamus. Error was brought in the Exchequer Chamber: and the case was there argued in Easter vacation (May 9th) 1846, before TINDAL, C. J., MAULE, CRESSWELL, and ERLE, Js., and PARKE, ROLFE, and PLATT, Bcs. The Court (on June 13th, 1846) reversed the judgment, holding that the Act, if it obliged the Company to provide some watering place or places where the ancient ones had been cut off, did not necessarily require them to make several such places in the closes of individual proprietors; and it did not appear in this case that one might not have been sufficient. They therefore held the mandamus void, as commanding one thing which the statute did not enjoin.

In the argument above reported, the case was cited from 16 Law J. N. S. 379, Q. B.

per acre, and from the payment of all tithe to the vicar by the said modus or annual payment of $1\frac{1}{2}d.$ per acre.

The return admits that the defendants have done neither of these things; and the questions substantially raised on the argument were, whether they were under the circumstances bound to do all these things, and, if not all, but only one or more, whether the writ, commanding all, could be sustained.

The first point (that upon the agreement) arises upon stat. 5 & 6 Vict. c. 54, s. 7: and the question is whether, under that section, the Tithe Commissioners are bound to confirm the agreements there mentioned, or have a discretion. If they have a discretion, they have exercised it in the present case, and we could not interfere with their decision. Nor, under the circumstances stated in the pleadings, should we see any reason to differ with them. Upon the construction of the section we are of opinion that, *in the cases to which it applies*, the Tithe Commissioners are bound to act under it, and must confirm according to its provisions. The words undoubtedly are only empowering; but it has been so often decided as to have become an axiom, that, in public statutes, words only directory, permissive, or enabling may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice. Now we cannot but see that the Legislature has considered the extinction of the payment of tithes in *475] kind by an equitable commutation in *land or money to be a great public benefit; and this section is clearly made for the advancement of such benefit: it supposes the case of an agreement for the giving land, or money, or both, instead of tithes or glebe; that such agreement is not of legal validity; and that the compensation is either a fair equivalent or not: in the former case it empowers the Commissioners simply to confirm; in the latter, to confirm, and also to award a rent-charge, which in addition may make up a fair equivalent; and, subject to these, to extinguish the right to the tithe in kind, or the glebe, or any other rent-charge. The provision for the case of the agreement unfair in amount appears to us strong to show that, wherever the tithe-owner and tithe-payer had come to such agreement as the section contemplates, which would be, so far as it went, in accordance with the general policy of tithe extinction, the Commissioners should not be at liberty to throw it wholly aside, but must make it the basis of their own settlement, even when, standing by itself, it was not fair in amount. Assuming that commutation is in itself desirable, in the case of any particular agreement for that purpose want of legal validity and insufficiency in value would be the only objections; and these, in effect, the statute puts out of the way. The section indeed does not provide for the possible case of an agreement which gave the tithe-owner too much; but it may well have thought such a case too improbable in fact to make it necessary to provide specially for it.

Still the question remains, whether the agreements in question, both or either, are shown upon the pleadings *to be within the section*. To ascertain this we must refer to the writ and certain parts of the return

*The former shows the first agreement to have been entered into in September, 1697. The parties to it are the impropiator, [*476 the vicar with glebe, the lords of certain manors in the parish, and the owners of certain, not said to be all the lands in the parish: and it is, first, for the enclosure and allotment of certain unenclosed lands, which the allottees were severally to hold free of all commons, tithes, and other duties to be claimed by the impropiator or the vicar or any owner of land, reserving only all manorial services, quit-rents, escheats, &c.: secondly, that 1s. per annum should be paid to the impropiator for every acre of the Old enclosures by the persons therein named. Under this agreement no provision appears to have been made for the vicarial tithes, except as to those of the New enclosures: and, as to these, the writ states that a plot called Preacher's Plot, containing somewhat more than 23 acres, was allotted to the vicar in lieu of all tithes payable to him in respect of the New enclosures, and also in lieu of his rights of common over them; and also that there were further allotted to him, *for glebe*, other plots amounting to somewhat more than 30 acres: and it is alleged in the writ, but denied in the return, that both these allotments the then vicar and his successors down to and including the present incumbent have enjoyed and this last still enjoys. This is the first agreement; and under it it is alleged and not denied that 380 acres were allotted to the impropiator as such, and as owner of Old enclosed lands; and that other portions were allotted to the other parties to the agreement, which allotments have remained in force to the present day. But it is obvious that this is not, nor professes to be any agreement in respect of the vicarial tithes generally: *whatever the vicar's [*477 endowment was as regarded the Old enclosures, so far as appears, it remained unaffected. The writ, however, goes on to show that, in 1707, in consequence of the then vicar's dissatisfaction with the agreement of 1697, a second agreement was come to between him and the then landowners of the parish, by which 1½d. per acre *on all the lands in the parish* was to be paid to him in respect of all small tithes throughout the parish; and the writ alleges that this payment was made and accepted down to 1812.

By the return it appears that the present vicar was inducted in 1796; that he has never been in possession or enjoyed the profits of the Preacher's Plot; and that he received the 1½d. per acre in lieu of small tithes down to 1811 in ignorance of the origin of such payment: that, as soon as he discovered it, he gave due notice to determine it, and has never since received it; and at the time of giving such notice he also offered, and is now willing, to give up any land which he held in lieu of small tithes. "It further appears," &c.

His Lordship then stated the proceedings in equity, in the words given, *antè*, p. 468; with the fact stated in the return that neither agreement, so far as they related to the vicar, had been acted upon since the filing of the bill in 1812.

Upon these special facts we have to determine whether the agreements presented to the notice of the Commissioners in 1843 are such as they were bound to confirm: and we are of opinion that they are not. It may be very true, as argued, that the decrees in the suits between the vicar and occupiers were not made in such suits, or between such parties, as to bind the right; that is to say, they could not have been receivable *478] as *evidence to that effect in any suit in which the right was to be determined: but they were still facts in the case very material, when coupled with others, to enable the Commissioners to determine whether the agreements in question were within the 7th section of the statute, and therefore to be confirmed. To be such, they must have been agreements subsisting in fact, requiring confirmation only because wanting validity in law. Here the evidence was that for thirty years before the statute passed the vicar had repudiated them; which, their illegality being admitted, he had then a clear right to do (and it is a condition of their coming within the act at all, that they were illegal): that, when he insisted on his common law right, the only defence made was on the footing of these agreements: that, if they had been valid, that defence must have prevailed: and the Court, being competent to entertain the question, decided for the account and against the agreements: that the impropiator, who, by his tenant Dawson (with whom the return identifies him), had stood at first upon the agreements, then acquiesced in the decision, and claimed the tithe of lambs and wool as against the vicar and an occupier, which, if the agreements subsisted, he could not have, because under the first of them the 380 acres and the 1s. per acre covered clearly all the tithe of every kind to which he was entitled: and, finally, that, from the termination of the suit, there had been a general acquiescence in what they substantially decided, and an abandonment of the agreements. We think that the Commissioners had a right to draw the conclusion which they did from these facts, that the agreements were not in a state to be confirmed, because not in fact sub- *479] sisting. It would be very mischievous *to hold that every illegal agreement, however long since abandoned, and not set aside by any decree only because not insisted on in any suit in which that could be conclusively decided, was within the section, and necessarily to be confirmed by the Commissioners. The reasonable limitation of the words must be to such agreements as were being acted upon, or only questioned in pending suits, at the time the commutation of the tithes comes under the consideration of the Commissioners.

We are thus brought to the conclusion that the writ is bad in respect of one of the matters which it commands to be done: and this raises

the second question, whether the writ, commanding this to be done with other things, can be sustained. One mode of trying this is to consider whether a peremptory writ can go in any other form than that of the first writ: if not, anything which shows that the writ could not issue peremptorily in its present form is a sufficient return to it in its present stage, and shows that it ought not to have issued at all.

Upon this point the practice appears to be uniform, that there must be no variation between the two writs but in the omission in the record to call on the defendants to show cause why they should not obey, and in the insertion of the word "peremptory." And it has certainly been well understood that on the argument for issuing the writ the rule for it might be moulded by the Court, but that, when it has issued, the writ itself cannot be altered. In *Rex v. The Church Trustees of St. Pancras*,^(a) 3 A. & E., reported more fully in 5 Nevill & Manning, [*480 this distinction was formally laid down and acted on. There was a writ and return, and demurrer to the return: the writ was objected to as commanding a thing to be done at such time and place, or times and places, as auditors might appoint, whereas the only duty was to do it at a place particularly specified in the local act: and it was urged that the writ might be moulded so as to limit the command to that place. But the Court refused, and held the objection fatal, Lord DENMAN, C. J., saying: "it is not a rule, but the writ itself, that is before us. We must enforce it in the terms in which it has issued, or not at all." My brother PATTESON says: "If one thing only is directed by the mandamus, and that is against the act of parliament, it would be a dangerous precedent to grant a peremptory mandamus in the manner suggested. We should be remoulding the writ. We may mould the rule for a mandamus, but not the writ itself."^(b) This case appears to determine the present. Nothing is suggested as really in controversy in the suits or differences, alleged to exist, but the construction of the agreements, and the right to have them confirmed: but, even if they were distinct, the principle of the decision would equally apply: the writ ought not to have issued in its present form; and we cannot enforce it in that form: it might lead to great injustice to parties who refuse to accede to a demand which calls on them to do several things, and it would be full of practical inconvenience, if the Court had to determine under what circumstances a writ shall be divisible, what part of it might be enforced, and what not; which it must do if *the writ be held divisible at [*481 all: whereas there is no hardship in holding that the prosecutor must be careful not to insist on more in the first instance than the law will allow him to enforce in the end. But, at all events, the points having been decided, and that according to the practice of the Court, we should do wrong if we were to adopt any other course.

(a) 3 A. & E. 535 (E. C. L. R. vol. 30), S. C. 5 Nev. & M. 219 (E. C. L. R. vol. 36).

(b) 3 A. & E. 542, 543 (E. C. L. R. vol. 30).

This makes it unnecessary to consider the remaining questions, or the objections in form to parts of the return which do not come in question upon the point on which we decide. Our judgment, therefore, will be for the defendants. This is the judgment of my brothers WIGHTMAN, EARLE, and myself.

Judgment for defendants.(a)

(a) The above case was referred to, on the last point, in *Regina v. The Kidwelly & Llanelly Canal & Tramroad Company*, argued in Hilary Vacation (9th February), 1849, on demurrer to the return, by *Parkley* in support of the demurrer, and *Gurney*, contra (before Lord DENMAN, C. J., PATTERSON, COLERIDGE, and WIGHTMAN, J.), and decided in the Hilary vacation following, February 26th, 1850; when PATTERSON, J., delivered the judgment of the Court as follows:

One objection to this writ of mandamus appears to us to be fatal, and to render it unnecessary to enter into other points which were raised on the argument. The writ directs the defendants to reinstate, repair, and maintain the railway. Now, so far as the direction to maintain goes, it is wrong, for it would extend to all time prospectively, and cannot have been refused by the defendants. Therefore, in *Rex v. The Severn and Wye Railway Company*, 2 B. & Ald. 646, the Court restricted the writ, and directed the rule to be absolute for a writ of mandamus to reinstate and lay down again, but not to maintain, the tramroad. We cannot now alter or mould the writ; and, if we were to grant a peremptory writ of mandamus, it must follow the language of the present writ, and direct the defendants to maintain. This point we decided very lately in the case of *Regina v. Tithe Commissioners*; and, if there be any doubt upon the question, that doubt must be resolved by a Court of Error. Judgment for defendants.

See also *Regina v. Caledonian Railway Company*, 16 Q. B. 19 (H. C. L. R. vol. 71).

*482] ***THOMAS BOURKE RICKETTS and HARRIET his Wife
v. WILLIAM FRANCIS BENTINCK LOFTUS. Dec. 18.**

Declaration in account stated that L., by deed (which was in defendant's custody, so that profert could not be made), settled land to such uses as L. should appoint, and, in default of appointment, to certain specific uses which were stated in the declaration: and that L. died without appointing: whereby the limitations in default of appointment took effect, under which plaintiff and defendant became tenants in common. From the limitations, &c., stated in the declaration, it appeared that they would become such tenants.

The declaration went on to allege that defendant received the rents and profits, and ought as bailiff to have rendered an account of what he received more than his share, but had not rendered such account.

The plea set out the deed, which appeared to be to the effect stated in the declaration; and it alleged that L. did appoint, setting out the appointment, which showed that plaintiff and defendant were not tenants in common.

The plea concluded with a verification.

Held, on special demurrer, a good plea; for that the fact of this appointment ought not to have been pleaded as a traverse of the allegation of non-appointment, such allegation in the count being unnecessary; and that, even if such allegation had been necessary, it was still necessary for the plea to set out the appointment, in order to show its effect.

ACCOUNT against defendant, as bailiff, according to the statute, &c. The declaration charged that, whereas heretofore, and before the commencement of this action, to wit, on 26th April, 1790, William Loftus was seised in his demesne as of fee of and in the manor, lordship, castle, towns, messuages, cottages, lands, hereditaments, and premises in the indenture hereinafter next mentioned conveyed as hereinafter men-

tioned; and, being so seised, afterwards, to wit, on the day and year last aforesaid, by a certain indenture of bargain and sale, made between William Loftus of one part and Arthur Wolfe and John Beresford of the other part, the day and year last aforesaid, &c.: the declaration then alleged a bargain and sale to Wolfe and Beresford, for a year from the day before the date, whereby, and by force of the statute, &c. (of uses), they became possessed for the said term, the reversion being vested in William Loftus: and afterwards, to wit, on 27th April, 1790, while Wolfe and Beresford were so possessed, by another indenture then made between the said William Loftus of the first part, George Marquis Townshend and The Right *Honourable Lady Elizabeth Townshend of the second part, [488 the said A. Wolfe and J. Beresford of the third part, William Henry Cavendish, Duke of Portland, and the Right Honourable John Townshend (commonly called Lord John Townshend) of the fourth part, the Right Honourable Frederick Townshend (commonly called Lord Frederick Townshend) and William Henry Cavendish Bentinck, Marquis of Titchfield, of the fifth part, and the said Lord F. Townshend and J. Wolfe, Esquire, of the sixth part (which said indenture, not being in the custody, control, or possession of plaintiffs, but in the custody, &c., of defendant, plaintiffs cannot bring here into Court, the date whereof is the day and year last aforesaid), the said William Loftus, for the considerations therein mentioned, did grant, bargain, sell, alien, release, and confirm to the said A. Wolfe and J. Beresford, and their heirs, the said manor, lordship, &c., and premises, so in and by the said last-mentioned indenture bargained, &c.: to have and to hold the same to them, Wolfe and Beresford, and their heirs, to the use of the said William Loftus and his heirs till a certain intended marriage between him and the said Lady Elizabeth Townshend should be had; and, immediately after the solemnization thereof, to the use of the said William Loftus for and during his natural life, &c. (limitation to preserve contingent remainders); and, subject to and after various other uses (all of which had been determined and satisfied before the receipt of the rents and profits by defendant as hereinafter mentioned), as to, for, and concerning the said manor, lordship, &c., and premises, to the use of Henry Loftus, William Francis Bentinck Loftus, Mary Ann Loftus, the said Harriet, the now plaintiff, then Harriet Loftus, *and Frances [484 Mary Loftus, the sons and daughters of the said William Loftus by Margaret his late wife, deceased, for such estate and estates, and in such parts, shares, and proportions, manner and forms, as the said William Loftus should from time to time, by any deed and deeds, writing or writings, to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, with or without power of revocation, or by his last will and testament in writing, to be by him signed, sealed, published, and declared in the presence of and attested by three or more credible witnesses, direct, limit, give, devise, or appoint

RICKETTS & LOFTUS. M. V. 1542.
 Ship, etc., and

[illegible]

advancement in the world and preferment in marriage of the said Henry Loftus, W. F. B. Loftus, M. A. Loftus, Harriet Loftus, and F. M. Loftus, the sons and daughters of the said William Loftus by the said Margaret his late wife, deceased, or any or either of them, to be raised and paid at such times, and with, under, and subject to such provisos, conditions, and limitations over, such limitations over being for the benefit of some or one of such children, as in and by such deed or deeds, to be sealed and delivered and attested as aforesaid, should be directed, declared, or expressed of or concerning the same, so as, in each of the said several grants, demises, limitations, or appointments, respectively, there should be inserted clauses, &c.: indemnifying trustees, and for determining terms when trusts should be satisfied and at an end. As by the said indenture, &c.

Averment, that the said intended marriage between the said W. Loftus and Lady Elizabeth Townshend, after the making of the last-mentioned indenture, to wit, on, &c., was had and solemnized, and that afterwards, and in the lifetime of the said William Loftus, the said plaintiff Thomas Bourke Ricketts, to wit, on, &c., took to wife the said Harriet Loftus; and the said Mary Ann Loftus and Frances Mary Loftus, after the execution of the said deed, and in the lifetime of the said William Loftus, to wit, on, &c., did, and each of them did, depart this life without leaving any heir *or heirs of their or either of their bodies lawfully issuing. And that the said William Loftus, [*487 afterwards, to wit, on 15th July, 1831, departed this life without having made any such direction, limitation, gift, devise, or appointment as in the said indenture and hereinbefore mentioned, and without having made any valid grant, demise, limitation, or appointment under or by virtue of the said proviso. And that the said W. F. B. Loftus, the now defendant, and the said Harriet survived him: whereupon and whereby the plaintiffs were seised, in right of the said Harriet, in their demesne as of fee tail, that is to say, to them and the heirs of the body of the said Harriet lawfully issuing, of a great part, that is to say, one undivided moiety, of the said manor, lordship, &c., and premises, as tenants in common thereof with the defendant. And defendant, for a long space of time after the said marriage, to wit, from thence hitherto, held the said manor, lordship, &c., and premises, together with the plaintiffs, as tenants in common as aforesaid: and defendant had also, during all that time, the care and management of the whole of the said manor, lordship, &c., and premises, and took the rents, issues, and profits thereof. By reason whereof, and according to the statute in that case, &c., it became and was the duty of defendant, as bailiff of the plaintiffs in right of the said Harriet of what he received more than his just share thereof, to render a reasonable account thereof to the plaintiffs, and their share thereof, according to the form of the statute, &c. And, although defendant, during the time aforesaid,

received more than his just share of the rents, issues, and profits of the said manor, lordship, &c., and premises, and plaintiff's share thereof, *488] that is to say, the whole of the rents, issues, and profits of the said manor, lordship, &c., and premises: yet defendant, though he was afterwards, to wit, on, &c., requested by the plaintiffs so to do, has not yet rendered a reasonable account to plaintiffs of the said rents, &c., so received as aforesaid, or either of them, or any part thereof, or of the said share of the plaintiffs, or any part thereof, but has hitherto wholly neglected and refused so to do: contrary to the form of the statute, &c.

Plea 3. That true it is that, after the making of the indenture first mentioned, and while Wolfe and Beresford were so possessed of the term, and the reversion remained in William Loftus, to wit, on 27th April, 1790, the said indenture of release was made, as in the declaration mentioned; and that the last-mentioned indenture is not in the custody, &c., of plaintiffs, but in the custody, &c., of defendant; and defendant now brings into Court here the last-mentioned indenture, which is in the words and figures following, that is to say: "This indenture," &c. (The indenture was set out verbatim; but it was not suggested that the effect was not accurately stated in the declaration, so far as respects the present question.) That William Loftus, in his lifetime, to wit, on 20th July, 1804, in pursuance, fulfilment, and execution of the proviso in the indenture of release, &c.: the plea then set out an appointment of the said manor, lordship, &c., and premises to Arthur French and Charles Lucas Edridge, for a term of one thousand years from the decease of William Loftus, in trust, by sale or mortgage, to raise money to a certain amount, to be applied as therein mentioned. That afterwards, to wit, on 15th July, 1831, William Loftus died, from *489] which time French and Edridge were *possessed for the term; the trusts whereof have not been satisfied. And defendant further says that the said William Loftus, by such appointment so by him in his lifetime in and by the said indenture made to the said A. French and C. L. Edridge as aforesaid, did make a valid appointment under and by virtue of the power in the said proviso in the said indenture of release or settlement contained, and in the said declaration in that behalf mentioned. Verification.

Plea 4. That, after the making of the indenture of release, which was and is in the words and figures as in the third plea set out, and after the marriage between William Loftus and Lady Elizabeth Townshend had been solemnized as in the declaration mentioned, and in the lifetime of William Loftus, to wit, on 5th April, 1823, the said Henry Loftus, in the last-mentioned indenture mentioned, did depart this life. That William Loftus, since deceased, in his lifetime, afterwards, and after the making of the last-mentioned indenture, and after his marriage with Lady Elizabeth Townshend, and after the decease of Henry

Loftus, and after the plaintiff T. B. Ricketts had taken to wife the said Harriet Loftus, and after the respective deaths of the said Mary Anne Loftus and Frances Mary Loftus, to wit, on 15th July, 1831, in pursuance and execution of the said power of appointment in and by the last-mentioned indenture reserved to him, William Loftus, did, by his last will and testament in writing by him signed, &c. (stating performance of the specified requisites), appoint the said manor, lordship, &c., and premises, and every part thereof, with the appurtenances to the same belonging, but subject and without prejudice to the trusts of a certain term of *one thousand years limited and created in the said manors and hereditaments by the said deed of appointment [*490 bearing date 20th July, 1804, in the third plea mentioned, to the use, intent, and purpose, &c. (the limitations of the will were then set out, giving an annual rent-charge of 100*l.* to the plaintiff Harriet for life, and, subject thereto, appointing the manor, lands, and hereditaments to the use of defendant in fee): such appointment, so by William Loftus, in his lifetime, in and by his said last will and testament, made as aforesaid, being such appointment as, in and by the said indenture above set out, the said W. Loftus was authorized and empowered to make and execute. Averment, that the said W. Loftus afterwards, to wit, on 15th July, 1831, died without altering his said will as to the said appointment. Verification.

Special demurrer to both pleas, assigning (among others) the causes afterwards insisted upon in argument. Joinder.

The demurrer was argued in last term,(a) and this vacation.(b)

Willes, for the plaintiff.—One question, which this demurrer raises, is of substance; namely, whether either of the appointments set out in the third and fourth pleas be valid. That point has already been decided in the affirmative, as to both, in *Ricketts v. Loftus*, 4 Y. & Coll. Exch. Eq. 519, by ALDERSON and ROLFE, Bs., on the Equity side of the Exchequer. If the Court will entertain the question, it *is proposed to dispute the propriety of that decision. [COLE- [*491 RIDGE, J.—As that point has been decided by a Court of co-ordinate jurisdiction, and you can go into error upon that decision, we think we ought not to hear the point argued.] Then, as to the form of the pleas: if the deed set out in the third plea, and referred to in the fourth, vary in effect from the deed recited in the declaration, the pleas ought to have been in the form of a traverse. Again, as to the appointments alleged in these pleas. The declaration sets out a state of facts negating any appointment by William Loftus, and deducing, from the facts, and the absence of appointment, an interest in the plaintiffs and defendant which is substantively alleged. The pleas

(a) November 20th: before COLERIDGE, WIGHTMAN, and ERLE, Js.

(b) December 5th: before PATTERSON, COLERIDGE, and ERLE, Js. COLERIDGE, J., left the Court towards the close of the argument.

allege appointments, so as to show an interest not consistent with that alleged in the declaration. That is a traverse of a conclusion of law. But, further, the execution of the appointments being inconsistent in fact with the necessary allegation in the declaration that there was no appointment, each plea is in effect an argumentative traverse; the pleas should have concluded to the country. If it was necessary to plead the particular effect of the appointments, that might have been done with an *absque hoc*.

Peacock, *contrà*.—The deed, as set out, does not vary in effect from that recited in the declaration: the plea merely gives it more fully. There could therefore be no traverse as to this. As to the allegations of the appointments. The declaration, upon the facts therein stated, deduces the title correctly. The pleas do not dispute that conclusion of law. They do, however, show other facts which, by way of confession and avoidance, destroy the effect of the facts alleged in the *492] declaration. And the facts so shown in the pleas are in the nature of new facts: because, although the declaration does negative the fact of the appointment, that was unnecessary and premature; and the defendant could not answer by denying that W. Loftus had made no appointment; he was bound to show affirmatively what is the appointment on which he relies. There might well be an appointment not destroying the interest which the declaration sets up. If a declaration alleges that A. was seised in fee, and then goes on to aver that he died seised, the plea cannot traverse the dying seised, but must show how the estate determined in A.'s lifetime. So, if the declaration stated that A. devised, and died without revoking his devise, a simple traverse of A. having died without revoking would be demurrable. In *Powell v. Bradbury*, 7 Com. B. 201 (E. C. L. R. vol. 62), the declaration charged that the defendants wrongfully and without reasonable cause dismissed plaintiff; the plea was that they did not dismiss him wrongfully and without reasonable cause, in manner, &c.: and it was held that this put in issue merely the fact of the dismissal: the plea ought to have shown reasonable cause affirmatively; the denial of reasonable cause in the declaration was premature, and so not traversable. "A traverse is not good when taken on matter, the allegation of which was premature, though in itself not immaterial to the case;" Stephen on Pleading, 276 (5th ed.), citing Sir Ralph Bovy's case, 1 Vent. 217. [COLERIDGE, J. —I do not understand Mr. *Willes* to dispute the general rule: but he says that the allegation in the declaration was necessary.] It is an *493] instance of what is called in Sir Ralph Bovy's case "leaping before coming to the stile; the declaration relies upon an estate shown to be vested until displaced by an appointment: it is for the defendant to show that it was so displaced. In *Hollis v. Palmer*, 2 New Ca. 713, a count on a promissory note alleged payment of interest within six years; and, on demurrer, it was held that the defendant

might plead the Statute of Limitations without noticing this allegation. *Hodgins v. Hancock*, 14 M. & W. 120,† affirms the same principle.

Willes, in reply.—The illustration suggested from the mode of pleading a title by descent fails: it is necessary to allege that the ancestor died seised; and the allegation may be traversed in terms, as appears from Com. Dig. *Pleader* (G 10).^(a) *Hodgins v. Hancock* decided a point apparently too plain for argument, that, where a plaintiff in his declaration gave credit for payment of part, this payment could not be traversed. In *Hollis v. Palmer*, the attempt seems to have been to trick the defendant by averring payment of interest within six years: the Court held this an immaterial allegation, the interest being merely accessory to the principal debt. In Sir Ralph Bovy's Case the allegation, that the escape for which the action was brought was voluntary, was held to be, though not irrelevant, immaterial at that step, because without it a good cause of action was shown. That is not the case as to the allegation here: the interest on which the action is founded arises only upon the failure to appoint. "In all cases where the estate or interest *commences on a condition precedent, *be the condition or act in the affirmative or negative*, and to be performed by the [*494 plaintiff, the defendant, or any other, the plaintiff ought, in his count, to aver performance;" Com. Dig. *Pleader* (C 51). *Powell v. Bradbury* rests on the same principle as Sir Ralph Bovy's Case. The rule introduced by the New Rules,^(b) that a special traverse must conclude to the country, was framed with the view of preventing argumentative traverses concluding with a verification. Some difficulty certainly might arise if the effect of the appointment did not appear. But the meaning of the averment in the declaration is that no such appointment was made as could prevent the plaintiff and defendant from being tenants in common. [PATTESON, J.—That is the difficulty: could the defendant traverse that? Could he refer the question to a jury?] It may be that the declaration is specially demurrable, because, if an issue were taken in the terms of the allegation, it could not be such an issue as, whichever way found, would conclude the question; that was the principle of *Burroughs v. Hodgson*, 9 A. & E. 499 (E. C. L. R. vol. 86). [*Peacock*.—The absence of appointment is not in the nature of a condition precedent: the interest is vested in the first instance.]

Cur. adv. vult.

PATTESON, J., now delivered the judgment of the Court.

The only question for our determination in this case is, whether the third and fourth pleas, in each *of which it is pleaded affirmatively that General Loftus, in the one case by deed and in the [*495 other by will, made an appointment under a power, and each of which

(a) Citing *Vivion v. St. Abyrn*, 2 Dyer, 107 a.

(b) Reg. Gen. Hil. 4 W. 4, General Rules and Regulations, 13; 5 B. & Ad. vi. (E. C. L. R. vol. 27).

pleas concludes with a verification, are good, or whether the defendant ought to have traversed an allegation in the declaration that General Loftus died without making an appointment, and concluded to the country.

We are of opinion that the pleas are good. We think the allegation in the declaration premature; and therefore that the defendant was not bound to traverse it. According to the case of *Doe dem. Willis v. Martin*, 4 T. R. 89, and many others, the remainder to the children was vested, subject to be divested by the exercise of the power of appointment by General Loftus. It was unnecessary, therefore, in the declaration to allege that the power had not been exercised.

But, even if this had been otherwise, and the allegation had been absolutely necessary, and even supposing that it is to be taken as a direct allegation that General Loftus had not appointed, yet, when the defendant, in this action of account between alleged tenants in common, comes to meet that allegation by an affirmative assertion that General Loftus did exercise the power of appointment, it is plain, according to all the rules of pleading and of common sense, that it was not sufficient for him merely to say that General Loftus did appoint, but that he was obliged to show how and to whom he appointed, in order to show that the plaintiffs and defendant were not tenants in common, and so to make his plea a bar to the action. *Consistently with the mere fact
*496] that General Loftus had appointed, the plaintiffs and defendant might be tenants in common; for the appointment itself might have made them so. There is nothing in the most technical rules of pleading which could make it necessary for the defendant to take a traverse which might be immaterial, instead of bringing the real state of the case before the Court as he has done by his pleas.

Judgment for defendant.

**FRANCIS JENKYNs v. WILLIAM BROWN, JOSEPH SHIPLEY,
SAMUEL NICHOLSON, and Others. Dec. 18.**

K. purchased corn at New Orleans for plaintiff, a London merchant, whose agent K. was. The purchase was made with K.'s money; and K. drew for the amount upon plaintiff, the bill being, in its body, expressed to be on account of the corn. K. sold the bill to defendant at New Orleans, and, at the same time, handed to defendant a bill of lading of the corn, which had been drawn for delivery to K.'s order and endorsed by K. K. at the same time empowered defendant to sell the corn if the bill of exchange should not be paid. Afterwards K. advised plaintiff of the transaction, forwarded to him the invoice, which stated the corn to be shipped at the risk and on the account of plaintiff, and requested plaintiff to accept the bill of exchange.

Held, that the inference from these facts was that K. did not transfer the property in the corn to plaintiff, subject to a lien, but only transferred the property to plaintiff on the condition of his paying the bill of exchange, and that, in the mean time, the corn was the property of defendant.

The corn having arrived in England, and the bills of exchange and lading having been forwarded to England by defendant, the bill of exchange was accepted by plaintiff. On its maturity, he offered to take it up: but it was not produced, owing to a mistake of defendant's agent in England as to its place of deposit. On a later day the bill of exchange was presented to plaintiff, who did not pay it.

Held, that defendant, under those circumstances, was entitled to retain the corn.

TROVER for Indian corn. Pleas: 1. Not Guilty; 2. That plaintiff was not possessed, &c. Issues thereon.

On the trial, before ERLE, J., at the Liverpool summer assizes, 1848, it appeared that the plaintiff was a corn merchant living in London, and employing Messrs. Klingender & Co. as his agents at New Orleans. In *April, 1847, Klingender & Co. purchased for plaintiff, at New Orleans, the Indian corn in question with their own money. They [*497 drew two bills on the plaintiff, one for 975*l.* 10*s.* 6*d.*, the other for 1537*l.* 14*s.* 10*d.*, both at thirty days' sight, for the amount; and in the body of these bills it was stated that they were to be placed to the account of the corn. These bills they sold (a) to the defendant, Samuel Nicholson, at the regular value of the bills, handing over to him at the same time, as security, the bills of lading for the corn, shipped as after mentioned; which were made payable to the order of Messrs. Klingender & Co., and endorsed by them. It was agreed between Klingender & Co. and Nicholson that the latter might sell the corn if the bills were not paid. Nicholson was a partner with the other defendants, the firm having houses of business both at New Orleans and at Liverpool. The corn was shipped for Liverpool by different vessels; and the invoices were made out, purporting that the corn was "consigned to order, by order, and for account and risk of Francis Jenkyns, Esq., London." The invoices were sent to the plaintiff from New Orleans by Klingender & Co., after the endorsement of the bills of exchange and handing of the bills of lading to Nicholson, with a letter to plaintiff, advising him of the shipment and of the drawing of the bills of exchange, requesting him to accept them, and adding: "bills of lading, as before, accompany the draft. This closes our present purchases for you." The corn arrived at Liverpool. Nicholson forwarded the bills of exchange and bills of lading to the Liverpool house *of defendants. The bills [*498 of exchange were presented for acceptance to plaintiff, and accepted by him, payable at Messrs. Smith & Payne's, bankers, London: and they became due on the 17th June, 1848. They were deposited, together with the bills of lading, by the defendants, with Messrs. Denison & Co., bankers, London. On the 17th of June the plaintiff called at Messrs. Denison & Co.'s, and demanded the bills of lading, offering to take up the bills of exchange. He was told that the bills of exchange had been sent to the clearing house, as was then supposed to be the fact: but it afterwards turned out that they had been locked up, toge-

(a) It was stated that this was a common mode of dealing with bills at New Orleans instead of discounting them.

ther with the bills of lading, at Messrs. Denison's. The plaintiff was requested to call the next day at Messrs. Denison's, but did not do so. The bills of exchange were afterwards presented for payment at Smith & Payne's, but were not paid. The defendants sued the plaintiff on the bills of exchange, and obtained a verdict. Subsequently to this, the plaintiff became bankrupt: but he afterwards made arrangements with his creditors, in consequence of which the fiat was annulled. At the time of these arrangements, the following instrument was signed on behalf of the defendants, and given to the plaintiff.

"London, February 9th, 1848.

"Received of F. Jenkyns 230*l.* 18*s.* 8*d.* in cash, and a promissory note 69*l.* 1*s.* 4*d.*, due 12 May, in full of all claim on him, as per agreement; it being understood that, in default of payment of the above promissory note, our original claim revives.

300*l.*

For BROWN, SHIPLEY & Co.

OVEREND, GURNEY & Co."

*499] "Afterwards, the plaintiff demanded of defendants the bills of lading; but the defendants claimed to retain them, insisting that the account had been taken on the supposition that they were indemnified to the amount of the value of the corn. Defendants afterwards sold the corn. The present action was then brought.

The learned Judge told the jury that no property in the corn had passed to the plaintiff, except upon the condition of his paying the bills of exchange: and that his offer to take up these bills on the 17th of June did not satisfy the condition: and, under his Lordship's direction, (a) a verdict was found for the defendants on the second issue and for the plaintiff on the first.

In Michaelmas term, 1848, *Watson*, for the plaintiff, obtained a rule nisi for a new trial, on the ground of misdirection. In last term, (b)

Martin and *Cowling* showed cause.—The question is, what *Klingender & Co.* meant as to the property in the corn. They bought it with their own money; and they might either make it their own property, or the property absolutely of the plaintiff, or the property of the plaintiff conditionally. They did the last, the condition being the payment of the bills. This construction was put on a similar transaction in *Wait v. Baker*, 2 Exch. 1.† There the party imposing the condition was the *500] vendor himself: but an agent has the *same rights as the vendor, and may reserve a lien, or enforce a stoppage in transitu. Nor was the interest of the defendants, as assignees of *Klingender & Co.*, put an end to by the offer to take up the bills on 17th June. The tender could do no more than suspend the right of the holder of the bills to recover before a fresh demand made. In effect there was merely

(a) The plaintiff's counsel did not require any question to be put to the jury, both sides leaving the result to the Court, as the inference from facts not disputed.

(b) November 2d and 3d. Before COLERIDGE, WIGHTMAN, and ERLE, J.

a failure to present the bills: that did not fulfil the condition of payment: and, till the fulfilment of that condition, no property passed to the plaintiff. It is not a question of lien: the property has never passed to the plaintiff at all. It is not the invoice, but the bill of lading, that is the symbol of property. The bills of lading are made out to the order of Klingender & Co. That was clear evidence that the property did not then pass to the plaintiff; *Wait v. Baker, Van Casteel v. Booker*, 2 Exch. 691, 708.† At what time then could the property pass to the plaintiff? The next step was the endorsement of the bills of lading to the defendants for valuable consideration. The letter accompanying the transmission of the invoices was not written till after the transfer of the bills of lading to the defendants: so that, even if the transmission of the invoices in itself would have affected the property, as against Klingender & Co., it took place after the vesting of the right of the defendants, and could not defeat that right. Assuming that personal property can be so dealt with as to pass on the performance of a condition (which is questionable), the condition has not been performed. The payment has never been made by the plaintiff: he might, instead of withdrawing his *tender upon the non-production of the bills of exchange and bills of lading, have paid the [501 money, and relied upon his supposed right to have the bills given up. The receipt of February 9th, 1848, was not an abandonment by the defendants of their right on the bills of exchange and bills of lading: it was given on the supposition that the corn was to be retained by them to meet the bills, as far as it could, the receipt being for a composition on the ultimate balance between the plaintiff and the defendants.

Watson and Overend, contra.—The effect of the shipment, the drawing upon the plaintiff, the invoices, and the bills of lading, was to confer the property upon the plaintiff at once, with a reservation to Klingender & Co. of a lien for the price. [ERLE, J.—Might not Klingender & Co. have reserved the property to themselves by express words? And have not the bills of lading, made for delivery to their order, the same effect?] They have not. If the corn had been lost at sea, the plaintiff must have borne the loss, having accepted the goods on the terms of the invoices. Klingender & Co. therefore could transfer only the right to the lien; and the defendants were in the position of an unpaid vendor holding the property under a lien for the payment. Then the offer of payment discharged the lien: the rule that a tender is no defence to an action if there be a subsequent demand and refusal is inapplicable to this question. It seems that, in *Scarfe v. Morgan*, 4 M. & W. 270,† if there had been an absolute refusal to accept payment, the Court would have held the lien to be determined: the same principle may be collected from *Stevenson v. *Blakelock*, 1 M. & S. 535, *Cowell v. Simpson*, [502 16 Ves. 275, and *Crozer v. Pilling*, 4 B. & C. 26 (E. C. L. R.

vol. 10). Immediately upon the tender, the defendants became wrongful holders. The offer of payment destroys the plea ipso facto. [ERLE, J.—You went to the wrong place. The bills ought not, in the course of business, to have been at Denison's. WIGHTMAN, J.—You should have gone to Smith & Payne's.] The bills were in fact at Denison's. In *Wait v. Baker*, 2 Exch. 1,† the vendee had not accepted the bill of lading or invoice so as to affirm the sale. *Van Casteel v. Booker*, 2 Exch. 691,† more nearly resembles this case. The Court there considered the case to be that of a right of lien in an unpaid vendor.

Cur. adv. vult.

COLERIDGE, J., now delivered judgment.

Although Klingender & Co. bought the corn in question abroad as agents for the plaintiff, yet, as they paid for it with their own money, it became their property; and, after the shipment, the cargo continued their property, as there is no evidence of an intention that it should pass, and as the taking of a bill of lading deliverable to their own order is nearly conclusive evidence that it did not pass. By delivering this bill of lading, endorsed to the defendants, as a security for the payment of the bills of exchange drawn on the plaintiff for the value of the cargo, and giving power to sell in case of failure of payment (the bills of exchange having been purchased by the defendant), they passed to the defendant for value a special property in the cargo; and by afterwards sending the *invoice with the bills of exchange and letters
*503] of advice to the plaintiff they passed to him the general property in the cargo, subject to this special property. Under this arrangement, the plaintiff's right of possession would not arise till the bills should be paid.

On the day of maturity the plaintiff offered payment of the bills to the holder of them; but, as they were accidentally mislaid on that day, the payment was not received, and the plaintiff was desired to pay on the following morning. This he was not then, and has not since, been able to do.

Upon these facts the plaintiff has contended that the defendants had no interest in the cargo beyond a lien for the amount of the bills; and that such lien was discharged by the offer of that amount; and that thereby the plaintiff was entitled to demand possession of the cargo without payment, and, on refusal, to maintain trover.

But we think that the defendants had a special property in the cargo, according to the intention of the parties as above stated, when the bill of lading was delivered to them. We also think that the offer of the money on the one hand, and the request on the other for a day's delay before receiving it, on account of an accident, did not amount to a tender and refusal of the payment, and did not discharge the plaintiff from his duty to pay the bills before his right to the possession of the cargo attached.

The law bearing upon many of these points is clearly laid down in *Wait v. Baker*, 2 Exch. 1,† and *Van Casteel v. Booker*, 2 Exch. 691,† with which we agree. It follows that the *verdict for the defendant was right: and the rule must be discharged. [*504]

Rule discharged.

NEEVES *v.* BURRAGE. Dec. 18.

A bill filed by a creditor of a deceased testator, for the administration of the estate under the direction of the Court, does not of itself suspend or control the executor's right to dispose of the property and make a good title.

The Courts of common law take judicial notice of this principle of equity; and evidence to show a contrary practice is not admissible.

ASSUMPSIT. The first count stated that the defendant set up certain improved ground-rents for sale on certain conditions; that plaintiff became the purchaser for 310*l.*, and defendant promised to perform the conditions and that he had a good title according to the conditions, and would convey: of which promise breaches were alleged. The second count was for money had and received, and on an account stated.

Pleas: Non assumpsit; and six pleas to the first count, all concluding to the country. Issues thereon.

On the trial, before ERLE, J., at the Middlesex sittings after Michaelmas term, 1848, the plaintiff failed to prove the first count, for want of a written agreement signed by defendant. The count for money had and received was then insisted upon: as to which the following facts appeared. The defendant was the executor of William Lewis Davis, deceased, who at the time of his death was owner of certain improved ground-rents upon property leased to him and which he had underlet. The defendant caused the rents to be set up for sale by public auction. The second lot was described, in the particulars of sale, as "A well secured improved ground-rent of 25*l.* 16*s.*, arising from, and well secured on, two houses, being Nos. 38 and 39 *on the North [*505 side of Drummond Street, St. Pancras, producing a rental of about 80*l.* per annum." The 3d condition of sale was: "the purchaser to pay down immediately a deposit of 20*l.* per cent., in part of the purchase-money, and sign an agreement for payment of the remainder on the 29th day of September next," &c. The 5th condition was: "That the vendor will deliver to the purchasers or their solicitors, seven days after the sale, abstracts of the leases under which the premises are respectively held, and the purchaser shall not require the production of the lessor's title, nor the production of any deeds or documents in any such leases recited or referred to: and the last receipt for rent shall be conclusive evidence that the covenants contained in the leases have been fulfilled: all deeds of covenant for production of deeds, attested,

vol. 10). Immediately upon the tender, the defendant, other documents, ful holders. The offer of payment destroys the possession of the vendors, J.—You went to the wrong place. The bills, contracts or otherwise, are to of business, to have been at Denison's. "W purchaser's expense." The have gone to Smith & Payne's.] The bi surviving executor of testator, In *Wait v. Baker*, 2 Exch. 1,† the ven- testator, the purchasers shall not lading or invoice so as to affirm th- trust, or devisees, or next of Exch. 691,† more nearly resemble want that he has not encumbered, sidered the case to be that of a The 8th condition was: "That,

COLERIDGE, J., now delive

Although Klingender & agents for the plaintiff, shall be unable in his opinion to remove, it became their proper of returning the deposit and determining their property, as the 9th condition was: "That, if the purchasers pass, and as the tr- with any of the above conditions, the depo- is nearly conclu- actually forfeited to the vendor, who shall be at full bill of lading. to another sale, either by public auction or private

of the bills The plaintiff purchased the second lot at the sale, on 23d July, 1847, cargo, and The plaintiff paid 62*l.* as deposit. The abstracts were handed to of excha- 31*l.*, and paid 62*l.* as deposit. The abstracts were handed to the def- according to the conditions: but, in the course of a correspondence

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him according to the conditions: but, in the course of a correspondence first learned that a bill in Chancery had been filed against the defend- ant, by a bond creditor of the deceased. The bill was filed on 2d June, 1847: and it prayed the Court to direct the administration of the trusts of the will, and appoint a receiver of the testator's personal estate, and of the rents and profits of his freehold, copyhold, and leasehold estates. The defendant appeared to this bill on the 4th June, 1847; but it was not shown that anything further had occurred in the suit. The plaintiff, being advised by his counsel that the title was not good, on 27th November, 1847, demanded back his purchase-money. The present action was brought for such purchase-money. For the plaintiff, a conveyancing barrister was called as a witness. He stated that, according to the practice in Chancery, under the present circumstances, the executor had not the power to sell; and that the plaintiff in the Chancery suit, and not the executor, would have the conduct of the sale if made under the decree of the Court. He referred to the cases of *Walker v. Smalwood*, Amb*l.* 676, *Cafe v. Bent*, 3 Hare, 245, *507] and *The Attorney-General v. Clack*, 1 Beav. 467. The learned Judge, being of opinion that there was no good objection to the title, directed a nonsuit, reserving leave to move as after mentioned.

In Hilary term, 1849, *Knowles* obtained a rule nisi to set aside the nonsuit and enter a verdict for 62*l.* In this Vacation, (a).

(a) December 4th. Before COLERIDGE and ERLE, Js. WIGHTMAN, J., was present at the earlier of the argument, and PATTERSON, J., at the later part.

Wordsworth and *R. W. E. Forster* showed cause.—The question arises entirely on the count for money had and received. Upon that, the plaintiff insists that there is a failure of consideration, because the suit in Chancery disables the executor from selling, except under the direction of that Court. The plaintiff, however, was aware, from the sixth condition of sale, that there were bond debts; and he had thus notice of the title being liable to the objection. But the objection fails. The executor, up to the time of an actual decree in Chancery, had the power of selling. A good title is enough; *Romilly v. James*, 6 Taunt. 263, 274 (E. C. L. R. vol. 1); where GIBBS, C. J., observed: "It is said that the plaintiff will have made out his claim to recover back his deposit, if a cloud is cast on the title. That is not so in a court of law; he must stand by the judgment of the Court, as they find the title to be, whether good or bad; and if it be good in the judgment of a court of law, he cannot recover back his deposit." That principle was acted upon in *Boyman v. Gutch*, 7 Bing. 379 (E. C. L. R. vol. 20), where ALDERSON, J., said (a) that *Curling v. Shuttleworth*, 6 Bing. 121 (E. C. L. R. vol. 19), which had been cited as establishing *an opposite doctrine, had been questioned in the Court of King's Bench. The recognised practice in Equity is that, up to the time of the decree, the executor may sell. The barrister who deposed to the contrary effect at the trial relied upon *The Attorney-General v. Clack*, where, pending an information filed for the purpose of having new trustees appointed, the existing trustees made an appointment to the trust, and a pecuniary arrangement, without the sanction of the Court: but all there decided was that the trustees, under such circumstances, were bound to show strictly that they had done right, and must bear the costs of such proof: there was no decision negating their power. He relied also on *Cafe v. Bent*, 3 Hare, 245: but the judgment of Vice-Chancellor WIGRAM there is expressly limited to the case of the Court having assumed the execution of the trust. He says: "There is no authority for the proposition, that the mere filing of a bill in this Court has the effect of suspending the power given by the will to the surviving or remaining trustee. There is no reason why the mere institution of a suit, which may never be prosecuted, should have the effect of preventing trustees from exercising their discretion. Where, indeed, the Court has assumed the execution of the trusts, it would be highly inconvenient, if not impracticable, that the trustees should afterwards act independently of the Court. The Court does not, however, in the absence of any misconduct in the trustees, deprive them of the exercise of their discretion, but only requires them to act under the control of the Court." It is the decree itself which has this effect; payments made after the institution of the *suit, but before a decree, are valid; *Mitchelson v. Piper*, 8 Sim. 64, *Maltby v. Russell*, 2 Sim. [*509

(a) 7 Bing. 390.

& Stu. 227, where *Earl of Oxford v. Daston*, Colles's Ca. Parl. 229, a case in the House of Lords, was acted upon. The result is that the executors not only may, but must, go on administering the estate, up to the time of a decree. A contrary decision would lead to great injustice: the mere filing of a bill would deprive the executor of his power, though he would be without the means of knowing whether the suit would be persisted in.

Corrie, *contrà*.—If the title be not good in equity as well as law, the vendor's contract is broken; *Maberley v. Robins*, 5 Taunt. 625 (E. C. L. R. vol. 1). In *Curling v. Shuttleworth*, 6 Bing. 134 (E. C. L. R. vol. 19), TINDAL, C. J., said: "The rule is, that where upon a sale there is such doubt upon the vendor's title as to render it probable the purchaser's right may become a matter of investigation, (a) the Court will not compel him to complete the purchase:" "if there be a reasonable degree of doubt, this Court will not expect the purchaser to proceed." That is a rule more stringent than it is necessary for the present plaintiff to insist upon: but at any rate there must be a good title, equitable as well as legal: if the title be not wholly good it is not good at all, and the vendee may recover his deposit money. The question arising upon an issue in a Court of law, the equitable title becomes matter of evidence: as to that, the evidence was that the title was bad in equity; and this was not contradicted: the nonsuit therefore was *510] wrong. This Court will *take judicial notice of the jurisdiction of Courts of Equity, but not of their practice: this may be collected from *Lane's Case*, 2 Rep. 16 b, *Tucker v. Inman*, 4 M. & G. 1049, 1065 (E. C. L. R. vol. 43), *Dicas v. Baron Brougham & Vaux*, 1 Moo. & Rob. 309, 312, *Rex v. Kooops*, 6 A. & E. 198 (E. C. L. R. vol. 33). If, indeed, the question as to the equitable title arose on a mere point of equitable interest, this Court might take notice of the equitable interest, as in bankruptcy: but the question here is whether the Court of Chancery, by its practice, will or will not restrain the executor from acting. Authority was referred to, in confirmation of the barrister's evidence. In *Walker v. Smalwood*, Ambler 676, a sale by the devisee of lands charged with payment of debts, made pending suit by a creditor praying sale and payment, was held to be void. It may be added that the same rule was recognised in *Drayson v. Pocock*, 4 Sim. 283, and in *Annesley v. Ashurst*, 3 P. Wms. 282. In that last case there had, it is true, been a decree: but the distinction between a suit pending and a suit where there has been a decree cannot be supported.

Cur. adv. vult.

PATTESON, J., now delivered the judgment of the Court.

The right of the plaintiff to recover the money claimed in the action depended on the question whether the defendant had a good title to the leasehold interest which was the subject of the contract. It was not

(a) See *Forster v. Hoggart*, 15 Q. B. 155 (E. C. L. R. vol. 69).

disputed that the leases were valid, and were in accordance with the conditions of sale: but it was *contended that the sale was void [*511 by the rules of equity, because a bill in equity had been filed by a creditor against the defendant, who was an executor and as such possessed of the leasehold interest in question, to which the defendant had appeared; it being supposed that an executor so circumstanced could not make a valid sale of a part of the assets. But we are of opinion that this ground cannot be maintained. We find no decision to that effect in respect of executors. On the contrary, the authorities cited show that the executor has the power of sale at any time before a decree in the suit. It seems that there would be inconvenience if the law were otherwise; as, then, a bill in equity for payment of a debt would in effect take away the power of obtaining the means of paying until the suit should be determined.

It is sufficient to say, of the cases cited on behalf of the plaintiff, where sales by trustees pending a suit had been held void, that none of them applied to a supposed trust arising merely from the relation of executor to a creditor of the testator.

It was further contended that the supposed rule in equity was a rule of practice merely, and, as such, the subject of proof by evidence; and that, according to the evidence at the trial, the rule existed.

But we think that the rule, if it existed, could not be properly classed with rules of practice, which relate to the proceedings in a suit merely. According to the contention of the plaintiff, the rule extends to render void the contract of a purchaser who was no party to the suit, and so to affect his substantive rights. It is, therefore, a part of the rules of equity of which *the Court is to take judicial cognisance: [*512 and the evidence was not admissible.

The rule therefore must be discharged.

Rule discharged.

DOE on the demise of JOHN PAYNE v. WILLIAM PLYER.

Dec. 18.

J. Payne, having two sons, Edward and John, and four daughters, Ann, Elizabeth, Mary, and Sarah, by his will (dated before 1st January, 1838) recited that he had surrendered, or intended to surrender, all that part of his estates which were copyhold to the use of his will. He gave to Edward and his heirs and assigns for ever all his estates lying in N., on condition of his paying an annuity to the four daughters, "or to the heirs of their body, share and share alike." He gave to John land at Stotfold and W., without words of inheritance, but adding, "I give the above to him, his heirs and assigns, for ever, upon condition" of paying an annuity to the daughters, "or the heirs of their body, share and share alike." He gave to Ann and Sarah each a cottage, without words of inheritance. "I give unto my son John the Meeting House," "if it is not made freehold, to save the expense of so many fines. But my will is for John to let Edward, Ann, Elizabeth, Mary, and Sarah have equal shares with him, the same as if it was freehold and gave amongst them. I give all the land I bought of Mr. Burton," "to ALA, Elizabeth, Edward, John, Mary, and Sarah Payne, as likewise The Meeting House and appurtenances, if it made free, share and share equally amongst them. If John refuse to let them

have share of the Meeting, he to forfeit all his Stotfold estate, to be divided amongst them. I give unto Edward Payne and John Payne all the estate as I bought of Mr. Reynolds, lying in the parishes of C. and W." "equally between, on condition of their paying 10*l.* a year to my daughters, their heirs or assigns: that is to say, 2*l.* a year to Ann," &c., "their heirs and assigns for ever." The will gave special directions as to the occupation and management of the Stotfold property, as to certain pecuniary legacies and the disposal of the surplus, as to mourning, funeral, &c., and appointed a trustee and executors. The will appeared to be drawn by an uninstructed person.

Held, that Ann, Elizabeth, Edward, John, Mary, and Sarah took only an estate for life in the land bought of Burton: for that there were no words of inheritance as to this; and the rest of the will supplied no inference of an intention to give more than a life estate: especially, that the clause for forfeiture of the Stotfold estate was by way of penalty and not of substitution for The Meeting House; and no intention therefore could be inferred that The Meeting House was given in fee like the Stotfold estate: nor, therefore, could any such inference be made as to the land bought of Burton.

EJECTMENT to recover two sixth parts of about twelve acres of land, lying in the parish of Stotford, Bedfordshire. There were two demises, by John Payne, bearing date respectively 1st April, 1842, and 1st July, 1846. The defendant pleaded Not guilty. On the trial before POLLOCK, C. B., at the Bedfordshire Lent *Assizes, 1848, a verdict *513] passed for the plaintiff, subject to the opinion of the Court on the following case.

By indentures, bearing date 23d October, 1780, one James Burton, being then seised in fee simple of the lands in question amongst others, demised the same to one Edward Payne, for a term of 500 years, by way of mortgage for securing 120*l.* and interest; which term became absolute by the non-payment of the mortgage-money at the time appointed.

By indentures of lease and release, bearing date respectively 19th and 20th September, 1788, and made between the said James Burton of the one part, and one John Payne of the other part, the said lands were duly conveyed to the said John Payne in fee: and, by an indenture of same date with the said release, the residue of the above-mentioned term of 500 years was duly assigned by the executrixes of the said Edward Payne, then deceased, to one John Brown, a trustee named and appointed by the said John Payne, in trust for the said John Payne, and to attend the inheritance.

On 11th July, 1791, the said John Payne, who continued in possession of the said lands under the said conveyance until and at the time of his death, duly made and published his last will and testament in writing, attested as was necessary for the passing of real estates: of which said will the following is a copy.

"This is the last will and testament of me, John Payne, of Stotfold, in the county of Bedford, farmer and maltster. Having surrendered, or intended to surrender, all that part of my estates as are copyhold, to the use of my will, I give unto my son Edward Payne, and to his heirs and assigns for ever, all my estate lying and being in the parish *514] of Norton in the county of Hertford, *upon condition of his paying 8*l.* a year amongst all my daughters, Ann, Elizabeth,

Mary, and Sarah Payne, or to the heirs of their body, share and share alike: but, if there should be but one daughter living, or the heir of but one, that is, but one left alive as has a right to it, then he is to pay that daughter or the heir of her body but 4*l.* a year: this sum of money to be paid to my daughters or their heirs and assigns, for ever, to do as they please with it when they arrive to the age of twenty-one years. I give unto my son John Payne The Plow at Stotfold, in the occupation of William Kitchener, with the Swade, closes thereunto belonging, and the seven acres of plowed land thereunto belonging, and a slip of swade as I bought of James Burton adjoining, being about two rood and a half, and the close adjoining there, called Jermin's Close, being about one acre and thirty poles, and the three acres of plowed land which I bought of Mr. James Ind and others, those all lying in the parish of Stotfold. I likewise give my son John Payne all that eighteen acres and two roods of land lying in Willian and Crothall field, and one acre of leasehold in Willian field. I give the above to him, his heirs and assigns, for ever, upon condition of his paying my daughters Ann, Elizabeth, Mary, and Sarah Payne the sum of 12*l.* a year, or the heirs of their body, share and share alike, that is, the heir of a daughter to have the mother's share if the mother is not living; but, if in case there is but one daughter alive, nor the heir of but one daughter, then he is to pay that daughter, or the heir of her body, but 6*l.* a year. I give this in the same manner as the other to do as they please with it when they arrive at the age of twenty-one years: this money to be received *by me trustees, till each of them come of age, toward helping [*515 bring them up. My will is for all the estates to be made clear to my sons; all fines and every other charge attending them out of my personal estate; so that they may enter on them clear of all charge besides what is mentioned to pay out to my daughters, their heirs or assigns. I give unto my daughter Ann Payne that cottage on The Green in occupation of James Howard. I give unto my daughter Sarah Payne my cottage in Frogland in the occupation of Thomas Mantle Weavour. Those to be made clear out of my personal estate, all fines and other expenses, the same as my other estates as I give to my sons, to enter on them quite clear of all expenses whatsoever. I give unto my son Edward Payne 500*l.* with the money as is coming to him out of Kirley and Bentley estates: then the rent is not to be demanded, as it is counted to make up the 500*l.* I give unto my son John Payne 500*l.* I give unto my daughters, Ann, Elizabeth, Mary, and Sarah Payne the sum of 300*l.* a piece, each daughter to receive the sum of 300*l.* when they arrive at the age of twenty-one years, to be paid by me trustees, their heirs or assigns. I give unto my son John Payne *The Meeting-House, other houses, swade, and appurtenances, if it is not*

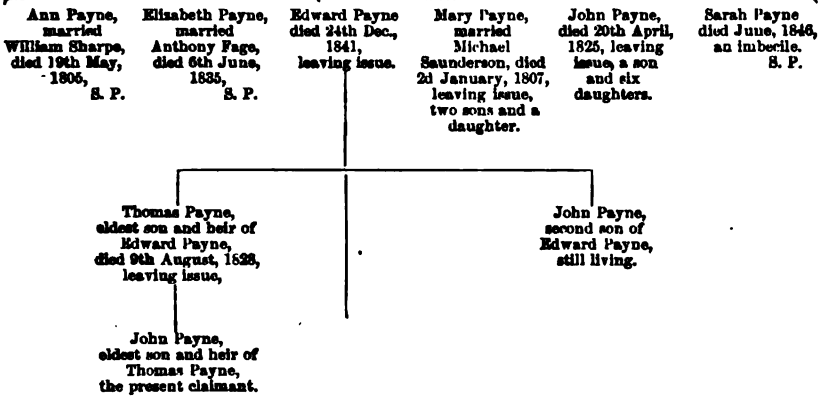
made freehold, to save the expense of so many fines. But my will is for John to let Edward, Ann, Elizabeth, Mary, and Sarah have equal shares with him, the same as if it was freehold and gave amongst them. I give all the land I bought of Mr. Burton, ploughed land, being twelve or thirteen acres or thereabouts, to Ann, Elizabeth, Edward, John, Mary, and Sarah Payne, as likewise the Meeting-House and appurtenances, if

*516] *it made free, share and share equally amongst them. If *John refuse to let them have share of the Meeting, he to forfeit all his Stotfold estate, to be divided amongst them. I give unto Edward Payne and John Payne all the estate as I bought of Mr. Reynolds, lying in the parishes of Clothall and Willian in the county of Hertford, equally between, on condition of their paying 10l. a year to my daughters, their heirs or assigns: that is to say, 2l. a year to Ann Payne, 3l. a year to Elizabeth Payne, and 3l. a year to Mary Payne, and 2l. a year to Sarah Payne, their heirs and assigns for ever: this to be paid at the time and in the manner as the other as was given them above. 'Tis my will for my children to live together, and keep this farm on at Stotfold, and decline all malting business, except they are a mind to make a very few at Stotfold: and the boys not to receive their fortune till twenty-five years of age. 'Tis my will that none of my children buy any black clothes for mourning; whichever doth buy any mourning, to have 50l. less money on that account. As to scarfs and gloves, do as they please, and give bread as usual, and bury me by my wife on that side next Church Close. And if you set a grave-stone, let it be without verse. When all my just debts are paid, and funeral expenses, all goings out and comings in kept to one account; and when the youngest is come of age, as they have all received their fortune, if there is anything over, to be paid amongst them, so as the share of a son is twice the share of a daughter, to be shared equally in that manner, the boys to have as much more as the girls a piece. 'Tis my will that my brother-in-law, William Nightingale, of Farlane, in the parish of Stevenage, Hertfordshire, should be in trust to see to my children; and*

*517] *whatever expense he is at to be paid *out of my personal estate. I do appoint Anne Payne, Elizabeth Payne, John Payne, and Edward Payne, joint executors of this my last will and testament; revoking all former wills by me at any time heretofore made; and do declare this to be my last will and testament."*

The said John Payne was, at the time of making his will and at his death, the owner of the several houses, land, and premises in the said will mentioned, as therein described; and died in 1791, without having altered or revoked his said will, and leaving him surviving the said six children in the said will mentioned. The following table correctly sets out the state of his family, and their posterity, with the dates of their births, marriages, and deaths, so far as is necessary for the purposes of this case.

John Payne, the testator,
died 6th November, 1790.



By indentures of lease and release, bearing date respectively 5th and 6th November, 1829, and made between the said Edward Payne, the eldest son of the testator, John Payne, of the one part, and one Henricus Octavius Roe of the other part, and after reciting a *certain mortgage bearing date the 29th September, 1820, and a [*518 certain other mortgage bearing date 29th September, 1825, it was witnessed that the last-mentioned Edward Payne did (in common form) convey to the said Henricus Octavius Roe the said premises, consisting of the twelve acres, or thereabouts, of open field, arable land, and three roods of dole swarths, in the common meadow called Low Meadow, in Stotfold, unto the said Henricus Octavius Roe, his heirs and assigns, to hold to and to the use of the said Henricus Octavius Roe, his heirs and assigns, for ever. And the said Edward Payne thereby covenanted for the title to the said premises, and against all encumbrances and claims, &c., except the several life estates of Elizabeth Fage and Sarah Payne, daughters of the said John Payne, of and in two undivided sixth parts of the said land and premises under the will of their said father, and except the before-mentioned mortgage and further charges.

The rent in respect of two acres of the said lands was regularly paid by the occupying tenant of the whole to Elizabeth Fage, in the said table named, until her decease in June, 1835. And the rent in respect of two other acres was, in like manner, paid to or for the use of Sarah Payne, in the said table named, until her death in June, 1846.

John Payne, the lessor of the plaintiff, is the heir at law of the said Elizabeth Fage, of the said Sarah Payne, and of the said last-mentioned Edward Payne.

The question for the opinion of the Court is, Whether, under the circumstances, the plaintiff is entitled to recover. It is agreed that, if the Court shall be of opinion that the plaintiff is entitled to recover

*519] the verdict, judgment shall be entered for the whole or such *portion of the land sought to be recovered as the Court shall direct. Otherwise a nonsuit shall be entered.

Either party to be at liberty to refer to the deed mentioned in the case.

The case was argued in last Easter vacation (a) and in the present vacation. (b)

Worledge, for the defendant (*O'Malley*, for the plaintiff, being absent at the beginning of the argument).—The daughters, Elizabeth and Sarah, through whom the lessor of the plaintiff claims, took only life estates under the will of John Payne. The words of the limitation to them are not distinguishable from those in *Doe dem. Norris v. Tucker*, 3 B. & Ad. 473 (E. C. L. R. vol. 23), where it was held that only an estate for life passed. *Silvey v. Howard*, 6 A. & E. 253 (E. C. L. R. vol. 33), is to the same effect, [*PATTESON, J.*, referred to *Gretton v. Haward*, 6 Taunt. 94 (E. C. L. R. vol. 1).] The devisees there took by the words “heirs of her body;” and there the “real and personal estate” was devised, words which might be held to describe the devisor’s interest: here the devise is of “land;” and, where the word “estate” does occur, it plainly describes the parcels devised, not the interest. On the other side, the attempt will probably be to suggest an opposite inference from other clauses of the will. It may be contended that the forfeiture clause, immediately following the limitation in question, would give the Stotfold estate in fee, as a substitute for the interest in The Meeting House, which interest must therefore itself be a fee. But this is not a sound inference: *the Stotfold estate is taken from John for *520] the purpose, not of indemnifying the six devisees, but of punishing John. It is observable that the devisor knows the necessity of words of inheritance; for, after giving to John the land in William and Crothall fields, without more words, he adds: “I give the above to him, his heirs and assigns, for ever.” Shortly afterwards, cottages are given to Anne and Sarah without words of inheritance. It is enough for the defendant to establish that there is a doubt whether the fee was meant to pass: there being no words of inheritance, the ordinary rule of law will not be departed from, except upon manifest indication of intention; *Roe dem. Bowes v. Blackett*, 1 Cowp. 235, 240. If, then, Elizabeth and Sarah took only estates for life, the lessor of the plaintiff cannot claim as their heir. It is true that he is the heir of John Payne, the devisor. But Edward Payne, the eldest son of the devisor, who had the reversion expectant upon the life estates, conveyed it away by the deeds of November, 1829. That these deeds passed the reversion is manifest from the covenant against all encumbrances except the life estates.

(a) May 9th, 1849. Before PATTESON, COLERIDGE, and WIGHTMAN, J.

(b) December 5th, 1849. Before PATTESON, COLERIDGE, and ERLE, J.

Further, even if Elizabeth and Sarah took estates in fee, yet the lessor of the plaintiff, who must make out his title as their heir through Edward Payne, the eldest son of the devisor, and releasor in the deeds of November, 1829, is estopped by those deeds. (The argument as to this is omitted, the point having become immaterial upon the view taken by the Court.)

Again, the legal estate is in the personal representative of John Brown, to whom the term of five hundred years was assigned by the deed of September, *1788. It cannot be treated as a term expired, as being satisfied. (The argument upon this point also [*521 is omitted, no decision having been given upon it.)

O'Malley, for the plaintiff.—Elizabeth and Sarah took estates in fee under the devise. It is true that the words by which the thirteen acres are given would, if standing alone, confer no more than a life estate. But this will not prevent the inheritance from passing, if, on looking at the whole will, that appears to be the intention of the devisor; *Doe dem. Orpe v. Frost*, 1 B. & C. 638 (E. C. L. R. vol. 8). Now, looking at the whole will, an intention appears to pass the whole interest in the several parcels, and indeed to regulate it very minutely. Even to the carrying on of the farm at Stotfold, the will goes into a particular detail. It is quite inconsistent with this to suppose any intention of leaving the inheritance undisposed of. It cannot be disputed that, in the first instance, the Stotfold estate is given to John Payne in fee. But it was manifestly intended that the interest given in The Meeting House should be co-extensive with that given in the Stotfold estate, inasmuch as, in one event, the latter is to take the place of the former. The thirteen acres are clearly given for the same interest as The Meeting House. It is urged that the Stotfold estate is given to the six, on the contingency, not as a substitution, but by way of forfeiture. The word "forfeit" is indeed used: but the clause is not penal; else no share in the Stotfold estate would, in the event, be given to John, whereas he is to take equally with the others. In *Green v. *Armsteed*, Hob. [*522 65 (5th ed.), land was devised to T. without words of inheritance; yet, because the devisor, in one event, directed land as good in value to be purchased for T., it was held that, "purchase" in common speech implying a fee, the first devise was of a fee. In *Gough v. Howarde*, 3 Bulst. 121, where the Judges were equally divided, the principle was admitted by all; and several illustrations are to be found in their judgments: among others, the following: (a) "a man did devise Black-acre to his eldest son and his heirs for his part, and White-acre to his younger son for his part (and omits to him and to his heirs), yet this shall be also to him and to his heirs, because the same hath dependency upon the former devise, and in the construction of this, it shall be guided by the same." It is on the same principle that, where an estate

(a) 3 Bulst. 124.

is given to A. after the death of the devisor's widow, an estate for life to the widow is implied. Here, if The Meeting House is not made freehold, it is given to John; but the six are to share it "the same as if it was freehold." It is given to John to save the expense of several fines. But it must be meant that, in that case, he is to take in fee: for, if he did not, the cestui que trusts would have their sixths only pur auter vie, whereas the law favours an estate for life of the owner, rather than an estate pur auter vie. Now, if John takes a fee in The Meeting House in this contingency, it is obvious that the others take an equitable inheritance; because there is a clear intention that the beneficial interests of the six should be commensurate. That principle prevailed in *Knight v. Selby*, 3 M. & G. 92 (E. C. L. R. vol. 42). The same

*523] inference arises from the words *which follow, "gave amongst them." [COLERIDGE, J.—I do not see why, if the lord enfranchised, he could not convey a life-estate to each.] The land bought of Reynolds is given to Edward and John Payne without words of inheritance; yet they clearly take a fee, because they take on condition of paying an annuity to the four sisters and their heirs: the construction might be otherwise if the annuities were simply charged on the land; for then they might cease when the estate in the land ceased, and it would not be necessary to imply a fee. The cases are collected in 2 Jarman On Wills, 171, ch. xxxiii. s. 2.(a) [PATTESON, J.—At that place the devisor uses the words "all the estate as I bought." That is a description of the parcels, not of the interests. [PATTESON, J.—The truth is that he does not know the meaning of the words he uses; and he inserts nonsense of every kind.] It is argued that, because sometimes words of inheritance are used, it is to be inferred that, where such words do not appear, there is no intention to pass the inheritance. But the more natural inference is that the devisor took for granted that the inheritance passed in each case: thus, where the words of inheritance are introduced in the condition annexed to the devise of William and Crothall fields, there is no appearance of any belief, on the part of the devisor, that he was enlarging the interest already given. The doctrine, that the strict legal sense of the words of a will can be altered only by express declaration of intention, is no longer maintained; Doe dem. Dacre v. Dacre, 1 B. & P. 250, 261, Denn dem. Bridaen v. Page.(b)

*524] *If the sisters, Elizabeth and Sarah, took only a life estate, the lessor of the plaintiff cannot claim through them: and it must be admitted that he cannot claim the reversion, as heir to his grandfather Edward Payne, in contravention of the deeds of November, 1829. But, if, as is contended for the lessor of the plaintiff, Elizabeth and Sarah took estates in fee, then those deeds will not prejudice the

(a) See note (1) to p. 172 of Perkins's edition, Boston, 1845.

(b) Note (a) to 1 B. & P. 261; S. C. note (b) to *Foster v. Lord Romney*, 11 East, 603.

title of the lessor of the plaintiff; nor will the term conveyed to Brown. (The argument on these points is omitted.)

Worlledge was again heard for the defendant.—In *Doe dem. Gwillim v. Gwillim*, 5 B. & Ad. 122 (E. C. L. R. vol. 27), there were stronger grounds than here for inferring a general intention to pass the inheritance: but, for want of words of inheritance, it was held that a life estate only passed: and stress was there laid upon a circumstance which is to be found here: that in some parts of the devise words of inheritance did appear, but not in the part in question. That the clause respecting the forfeiture of the Stotfold estate is in pœnam, and not for the purpose of substitution, may be inferred from the consideration, that, if John allowed the rest a share of The Meeting House, but his heir refused to do so, the clause would not take effect at all. *Green v. Armsteed*, Hob. 65 (5th ed.), applies only where one estate is clearly an equivalent for the other. In *Knight v. Selby*, 3 M. & G. 93 (E. C. L. R. vol. 42), the deviser professed to dispose of his “real estate.” In *Doe dem. Orpe v. Frost*, 1 B. & C. 638 (E. C. L. R. vol. 8), the Court considered that an intention appeared to give a fee to some of a class, and thence *inferred the same intention as to the rest of that class. [*525

O’Malley was heard in reply.

Cur. adv. vult.

PATTERSON, J., now delivered the judgment of the Court.

The first question in this case is, what estate did the devisees of John Payne (the testator) take under his will. The words are “I give all the land I bought of Mr. Burton, ploughed land, being twelve or thirteen acres or thereabouts, to Ann, Elizabeth, Edward, John, Mary, and Sarah Payne, as likewise The Meeting House and appurtenances, if it made free, share and share equally amongst them. If John refuse to let them have share of the Meeting, he to forfeit all his Stotfold estate, to be divided amongst them.”

The will being in 1791, these words of themselves clearly give only life estates: there are no words of inheritance, nor any words such as “estate,” “property,” or any similar expressions. Neither are there to be found, throughout the will, any other words referring to, or in any way applicable to, “the land I bought of Mr. Burton,” which is that in dispute. But there are other words in the will, as to The Meeting House which is contained in the disputed devise, from which it is contended, for the lessor of the plaintiff, that the testator manifestly intended to pass the fee in The Meeting House; and thence it is inferred that he had the same intention as to the land in dispute, and has sufficiently expressed that intention. The Meeting House was copyhold; and, immediately before the *devise in dispute, it is devised in these words. “I give unto my son John Payne The Meeting House, other houses, swade, and appurtenances, if it is not made freehold, to save the expense of so many fines. But my will is

for John to let Edward, Ann, Elizabeth, Mary, and Sarah have equal shares with him, the same as if it was freehold and gave amongst them." Here, again, there are no words which would pass more than life estates.

But, inasmuch as in the devise in dispute John is to forfeit to the others all his Stotfold estate if The Meeting House should not be made freehold and he should refuse to let them share in it, and inasmuch as the will had already given John the Stotfold estate in fee, so that the others, in the event of his incurring the forfeiture, would take the Stotfold estate in fee, it is argued that it must have been intended that they should take The Meeting House in fee in the event of his not incurring the forfeiture, and, by consequence, the land in dispute also. The case of *Green v. Armsteed* was relied on for the former part of this position. That was a devise to A. for life, with remainder to his son B. (without words of inheritance); but, if A. should purchase for B. property of equal value, then A. was to have the fee in that devised. The Court held that B. took a fee in remainder, because the equivalent which A. had the option of purchasing for B. must manifestly be some property in fee, since A., by such purchase, was to acquire the fee in the property devised. For the latter part of the position, *Gough v. *527] Howarde*, 3 Bulst. 121, 124, was relied on, in which a case is *cited of a devise of Blackacre to one son and *his heirs*, and of Whiteacre to another son, omitting *his heirs*, yet it was held that the testator meant to give the same interest to both sons. The present devise is perhaps stronger than the case in *Bulstrode*, because the land in question and The Meeting House are both comprised in the same devise (that in dispute), and it is fairly to be inferred that the testator intended to give the same interest in both properties. Looking, however, at the whole of this will, as it affects both properties, we agree with the learned counsel for the defendant that the forfeiture of the Stotfold estate is not by way of equivalent for The Meeting House, but by way of penalty on John, the devisee, in the event of his disobeying the testator's expressed wish as to The Meeting House, and that we cannot collect from the words used either that John would take the fee in The Meeting House if it continued copyhold and he refused to let the others share in it, or that all would take the fee in it if it became freehold; much less that the testator has used words sufficient to pass the fee in the land in question.

It follows that the rule universally adopted in the absence of sufficient words of inheritance must prevail, as it did in *Doe dem. Norris v. Tucker*, 3 B. & Ad. 473 (E. C. L. R. vol. 23), and *Silvey v. Howard*, 6 A. & E. 253 (E. C. L. R. vol. 33); and that we must hold that the devisees took only estates for life.

This makes it unnecessary to consider the other points raised in the case. And a nonsuit must be entered. Nonsuit entered.

*The QUEEN *v.* the Inhabitants of the Parish of ST. MARGARET, in the Borough of LEICESTER. *Dec.* 18. [*528
Reported, 12 Q. B. 98 (E. C. L. R. vol. 64).

KEENE *v.* WARD. *Dec.* 18.
Reported, 13 Q. B. 515 (E. C. L. R. vol. 66).

DOE, on the several demises of The QUEEN and GEORGE FINCH,
v. The Archbishop of YORK, The Earl of DEVON, and JOHN
LOCH. *Dec.* 18.

The second judgment in this case is reported *antè*, pp. 108, 109.

VIGERS *v.* THE DEAN AND CHAPTER OF ST. PAUL's, decided in this
vacation, will be found at the end of the volume.

END OF MICHAELMAS VACATION.

CASES

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

Hilary Term and Vacation,

XIII. VICTORIA. 1850.

The Judges who usually sat in Banc in this Term and Vacation were

PATTESON, J.

WIGHTMAN, J.

COLERIDGE, J.

Lord DENMAN, C. J., was absent during the whole Term and Vacation, on account of ill health.

The QUEEN *v.* JAMES JOSIAH HARDEY.

In the Matter of the Arbitration in the QUEEN *v.* HARDEY, in MIDDLESEX, and The QUEEN *v.* HARDEY, in LONDON.

Jan. 11.

Two indictments, one for perjury, another for conspiracy, were removed into this Court by certiorari. The indictment for perjury came on for trial at Nisi prius, when, under the advice of counsel, it was agreed that no evidence should be tendered, a verdict of Not guilty taken on both indictments, and that all matters in difference between the prosecutor and defendant should be referred to a barrister; the cost of the indictments, reference, and award to be in his discretion. An order of reference, as at Nisi prius, in the usual form, was afterwards drawn up, and was made a rule of court. After several meetings, the defendant revoked his submission, and took steps in a Chancery suit, which was one of the matters in difference so referred. On motion to attach him for contempt, or to set aside the verdict on the indictments:

Held, that it would have been illegal to refer an indictment for perjury, or, *semble*, for conspiracy; but that the indictments were not referred, and the verdicts of acquittal, given on the ground that no evidence was produced, must at all events stand; and there was nothing illegal in referring all matters in difference and at the same time consenting to a verdict of

acquittal, unless there was a corrupt agreement to stifle a prosecution, which in the present case did not appear to be the fact.

Held, also, that the arbitrator could not be considered as appointed by an order or rule made in an action, within the first branch of stat. 3 & 4 W. 4, c. 42, s. 39, and it was doubtful whether the order of *Nisi prius* could be treated as an agreement within the second branch. *Quære*, also, whether the order of *Nisi prius* was good, there being at the time it was made no cause before the Court.

The Court under the circumstances discharged the rule without costs.

HURLSTONE, in last Michaelmas term, obtained a rule calling upon the above-named defendant to show cause why an attachment should not issue against *him for his contempt in prosecuting a suit in equity in respect of certain matters relating to the said arbitration; and for his contempt in revoking the authority of the arbitrator to proceed in the said arbitration: or why the said defendant should not pay to the prosecutor John Hovell Triston the costs of and occasioned by the said arbitration, or such costs as this Court should think reasonable: or why the verdict of Not Guilty entered on the indictments after mentioned should not be respectively set aside and writs of procedendo issue. [*530]

The rule was obtained on reading the after-mentioned rule of Court, and on an affidavit (by Triston and his clerk) which stated the following, among other, facts.

Messrs. John Hovell Triston and Sebastian Crespel Hardey carried on business in London as solicitors, in partnership. In 1843 they dissolved the partnership, and appointed a trustee, Edward Taylor Dartnell, to wind up the affairs. In January, 1847, Hardey died: and, in the same month, his brother, James Josiah Hardey, claimed certain balances as due to him upon accounts stated between him and the firm, and filed a bill in Chancery against Triston and Dartnell for an account of the sums due to him, J. J. Hardey, from the firm, and for an injunction to restrain Triston and Dartnell from receiving certain moneys then due from Sir Matthew Barrington, or any other debts or sums due to, or other the effects of, the said *firm; and from negotiating certain bills, &c.: also that the sum due [*531] from Sir M. B. might be paid to J. J. Hardey, or brought into Court, &c.: that an account might be taken of the assets got in by Dartnell, and that the same might be applied in part payment of the debt due from the firm to J. J. Hardey, &c.: and that Dartnell might be removed from the trust, and a receiver appointed. J. J. Hardey afterwards moved the Court of Chancery, upon several affidavits, made by him, for an injunction and appointment of a receiver, pursuant to the bill. The Court, on May 3d, 1847, made an order accordingly; and it was, by consent, referred to the Master to take an account. Triston afterwards preferred bills of indictment against J. J. Hardey for having conspired with the said S. C. Hardey to defraud Triston by the said alleged accounts stated and otherwise, and also for perjury in the said affidavits in the Court of Chancery. The bills were

found at the Central Criminal Court, and removed into the Queen's Bench by certiorari at the instance of J. J. Hardey: and the indictment for perjury came on for trial before WIGHTMAN, J., at Westminster, on 27th June, 1848, when Triston attended with witnesses; but it was then arranged in Court between the leading counsel for the prosecution and the defence that a verdict of Not Guilty should be entered on both indictments (the indictment for conspiracy being then about shortly to come on in London), and all disputes between Triston, J. J. Hardey, and Dartnell be referred to arbitration. An order of nisi prius was drawn up accordingly as of 27th June; but Dartnell refused to be party to the reference: and it was thereupon agreed between Triston and *532] J. J. Hardey that all matters in difference between themselves only should be referred to arbitration, and that such reference should be made a rule of Court. The order of reference finally stood as follows.

"Middlesex, to wit. At the sitting of Nisi Prius, holden at Westminster Hall, on Tuesday, the 27th day of June, in the 12th year," &c., "before the Honourable Sir W. WIGHTMAN," &c.

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| <p>The QUEEN v. HARDEY; and The QUEEN v. HARDEY, in London.</p> | } | <p>"It is ordered by the Court, by and with the consent of the parties, their counsel and attorneys, that the jury find a verdict of Not Guilty, no evidence being offered on either side in either indictment; subject to the award or certificate, order, arbitrament, final end, and determination of Frederick Robinson, Esquire, barrister at law, to whom these several indictments and all matters in difference between Triston and defendant are hereby referred, to order and determine what he shall think fit to be done by the said parties respecting the matters in dispute, so as the said arbitrator do make and publish his award or certificate in writing of and concerning the matters hereby referred," &c. (clause, as usual, for the award being made and ready for delivery), "on or before the fourth day of Michaelmas term next." Liberty to the arbitrator to enlarge the time. Also: "That the said arbitrator shall have all the powers of certifying and otherwise of a judge at Nisi prius, and shall be at liberty to state any question for the opinion of the Court. And that a verdict of Not guilty in the said indictment in London shall be entered when the said case is called on. It is also ordered," &c.: *533] power reserved to the Court, in case of objection, "to refer back the said *cause to the same arbitrator, the said F. R., touching all or any of the matters hereby referred. It is also," &c.: power reserved to the arbitrator to examine the parties on oath, and to swear them and the witnesses: the parties to produce before the said arbitrator all such books, deeds, papers, and writings in their or either of their custody or power relating to the matters in difference as he shall require. Further order: "that the costs of the several indictments, and the costs of the reference and award or certificate, shall be in the discretion of</p> |
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the said arbitrator, who shall award or certify by whom, to whom, and in what manner the same shall be paid: the prosecutor not to be prejudiced by not having offered evidence in either indictment." There were also the usual clauses binding the parties in all things to stand to, abide by, &c., the award so to be made, &c.; not to bring error, or sue the arbitrator or each other; that in case of affected delay the arbitrator might proceed *ex parte*, &c.; and that the order might be made a rule of Court. The order had the usual conclusion. "By the Court. Thomas Denman, clerk at the sittings of *Nisi prius*."

Verdicts of Not guilty were taken on the indictments, no evidence being offered. Several meetings were held, and proceedings taken under and pending the reference, which the affidavit related in detail. At the seventh meeting, counsel for J. J. Hardey objected to the arbitrator's authority on the ground that the order of *Nisi prius* was made in the matter of an indictment; and the said counsel ultimately, at the same meeting, gave a written notice of revocation; the opposite party being at that time ready to proceed with their case before the arbitrator. The defendant afterwards took steps in the Chancery suit without the *leave of this Court, or sanction of the arbitrator. The time for making an award had been duly enlarged, and was [*534 as yet unexpired; and the order of reference had been made a rule of Court (see pp. 543, 4, post), and the rule served on J. J. Hardey.

The deponent, Triston, denied (as far as regarded his own motives and conduct) that the submission to arbitration was a corrupt agreement made in consideration of compromising the indictment for perjury; and he averred that the proceedings against J. J. Hardey for perjury and conspiracy were instituted *bonâ fide*, and under the advice of counsel; that deponent had employed great labour and expense in preparing for trial on both indictments, and had hoped to succeed; that he never instructed counsel to make any compromise; nor had there been any offer of compromise by deponent or with his knowledge before the indictment for perjury was called on; at which time the leading counsel on each side conferred together, and the deponent's leading counsel then recommended to him that an acquittal should be taken and the matters in difference referred; and that deponent was averse to the step, but consented to it in reliance on his counsel. Triston also stated his belief that the Judge who presided when the reference was agreed to knew the nature of the indictment then called on.

J. J. Hardey made an affidavit in opposition to the rule, entering into the merits of the Equity suit, and alleging that the indictments were preferred to intimidate him, and deter him from following up the proceedings in Chancery; (a) and that, after the finding *of the bills, overtures for a compromise were made, as deponent believed, [*535

(a) The affidavit stated that in the indictment for conspiracy the filing of the bill in Chancery was alleged as an overt act of conspiracy to cheat and defraud Triston of his money.

on behalf of Triston. The affidavit also contained statements intended to justify the revocation of the arbitrator's authority, and to show that such revocation had been acquiesced in by Triston. These details are not material to the present report. The affidavit stated also that the order of *Nisi prius* of June 27th was made without the consent of Her Majesty's Attorney-General, or any warrant from him.

Keane now showed cause.(a)—The order of reference was invalid, as carrying out an illegal agreement to suppress a criminal prosecution; *Ward v. Lloyd*, 6 Man. & G. 785 (E. C. L. R. vol. 46); and the objection, being in furtherance of the public interest, may be taken by a party to such agreement. An order of this kind could not be made by a criminal court, and is not the more regular because made in a criminal case at *Nisi prius*. [COLERIDGE, J.—Is the cause less a *Nisi prius* cause because the case is a criminal one? WIGHTMAN, J.—Cannot an indictment for nuisance be referred?] It has been doubted whether a criminal court could refer one. [WIGHTMAN, J.—Then you contend that the parties could not submit to such a reference. The ordering by the Court is mere form.] Consent cannot give jurisdiction. [WIGHTMAN, J.—It is the rule of Court you are objecting to, not the order of the Judge.] The rule of Court is wrongful if the Judge's order was so. [COLERIDGE, J.—You do not distinguish between a judge sitting at *536] *Nisi prius* and a judge sitting for gaol delivery. The Judge *at *Nisi prius* has only to try the issue.] He can sentence at once. [COLERIDGE, J.—He may do so now, by stat. 11 G. 4 & 1 W. 4, c. 70, s. 9; but in general he has only to dispose of the issue, as in a civil cause. PATTESON, J.—The order here does not refer the question of Guilty or Not Guilty: that it could not do. It only refers the questions out of which the indictment arose. A verdict is taken; but the jurisdiction of the Court is not gone, because it has not yet given judgment: and the Court has still to ascertain what its judgment shall be.] The proper course, if any, would be, when the verdict is taken, to make the parties enter into obligation under stat. 9 & 10 W. 3, c. 15, s. 1: but the matter of these indictments is not a "controversy, suit, or quarrel" "for which there is no other remedy but by personal action or suit in equity." Stat. 12 & 13 Vict. c. 45, s. 12, gives the power of referring to arbitration, by a judge's order, to be afterwards made a rule of Court, matters for which the remedy is by appeal to Quarter Sessions; but the power is limited to such matters. [COLERIDGE, J., mentioned *Keir v. Leeman*, 6 Q. B. 308 (E. C. L. R. vol. 51).(a)] The present case is within the principle there laid down by this Court, and affirmed by the Court of error: in effect the verdict is allowed to go for the defendant in consideration of a reference being submitted to in favour

(a) Before PATTESON, COLERIDGE, and WIGHTMAN, Js. The argument was not completed on this day, and was resumed on January 12th before the same Judges.

(b) Judgment affirmed in Exch. Ch.; *Keir v. Leeman*, 9 Q. B. 371 (E. C. L. R. vol. 58).

of the prosecutor. Neither is this a reference made irrevocable by stat. 3 & 4 W. 4, c. 42, s. 39. The submission of an indictment is not within the meaning of that clause; *Rex v. Bardell*, 5 A. & E. 619 (E. C. L. R. vol. 31). **[PATTESON, J.—The attachment is asked for on the ground that, supposing the revocation effectual, it is a* [*537 *contempt of the Court.] It was beyond the common law power of this Court to make a submission of a suit in Chancery a rule of Court, Nichols v. Chalie, 14 Vesey, 265. (Keane then took many objections to the proceedings on the reference: these are omitted in the report.)*

Sir Frederick Theiger, C. J. Forster, and Hurlstone, in support of the rule.—The motion for an attachment in this case is made on the suggestion of Vice-Chancellor WIGRAM.(a) The first objection to the motion seems to be that it is illegal to refer an indictment at all. In fact, no criminal matter was referred here. The verdict of acquittal put an end to the indictments. But, supposing that the Judge at *Nisi prius* had referred indictments, this would not be beyond his authority. In many cases it would be improper; but in others it may be the best and most fitting course. [*COLERIDGE, J.—The defendant may always consent to a verdict of Guilty. Why should he not be allowed to refer the question, whether there shall or shall not be a verdict of Guilty? The Court has power to set aside a verdict taken at Nisi prius in a criminal case as well as in a civil one. A reference on an indictment for a nuisance has been sanctioned.*(b) I do not therefore see any objection in principle to referring an indictment: that is, in cases where the subject-matter of the indictment is itself fit to be referred.] The point does not arise here, as in fact the indictments were terminated, and the Judge referred the other matters. *Then it is objected [*538 that a reference made in connexion with a verdict in a criminal matter is necessarily illegal. There can be no doubt that, whenever there is a corrupt agreement to stifle a prosecution, all things, whether references or agreements, founded on that corrupt consideration, are void. *Collins v. Blantern*, 2 Wils. 341, lays down the rule; and numerous authorities are collected in Mr. Smith's note upon that case.(c) But the whole depends on the question of fact, whether it was corrupt; *Ward v. Lloyd*, 6 M. & G. 785 (E. C. L. R. vol. 46). In this case there is no pretence for saying that there was any corrupt agreement to stifle the prosecution. It appears by the affidavits that the prosecutor reluctantly consented to tender no evidence, in deference to his counsel: so that the argument on the other side must be that it is always illegal to withdraw from a prosecution. But counsel in a criminal case are to some extent exercising a judicial function: and, if they are convinced that the cause must end in an acquittal, and that by

(a) See *Hardey v. Dartnell*, 13 Jurist, 727.

(b) See *Regina v. Dobson*, 6 Q. B. 637 (E. C. L. R. vol. 51).

(c) 1 Smith's L. C. 168.

tendering evidence they should waste the public time, and hurt the interests of the parties without any result, they ought to refuse to proceed.

Then it is said that the order of reference is not within either stat. 9 & 10 W. 3, c. 15, or stat. 3 & 4 W. 4, c. 42, s. 39, and, consequently, that it was revocable. Supposing it to be so, the revocation would not the less be a contempt of Court. But it never has been determined that, when a cause and all matters in difference are referred, the reference is entirely under the common law power of the Court. It would *539] seem that this, so far as regards the cause, *is a reference by the common law power of the Court, and, so far as regards the matters in difference, is an agreement to refer. Such seems to have been the opinion of Lord ELDON in *Nichols v. Chalie*, 14 Vesey, 265. And the agreement between the parties to refer the matters in difference cannot be the less binding because sanctioned by the order of *Nisi prius*, even if that sanction is in itself inoperative. [WIGHTMAN, J.—But is not the agreement to refer all matters in difference a *parol submission*? Now a *parol submission* cannot be made a rule of Court under stat. 9 & 10 W. 3, c. 15; *Ansell v. Evans*, 7 T. R. 1.] The order is in writing; and the statute does not require that it should be signed by the parties. At all events, the submission being sanctioned by the order of *Nisi prius*, and made a rule of this Court, it was a contempt to revoke it. [WIGHTMAN, J.—The indictments were terminated by the verdict, so that, when the submission was made, nothing was pending at *Nisi prius* or in this Court. Is there any case in which the parties have by *parol* made a submission under the sanction of a Court in which no matter was then pending?] That objection might have been taken in *Hayward v. Phillips*, 6 A. & E. 119 (E. C. L. R. vol. 33). [COLERIDGE, J.—There the order was whilst the cause was pending; and a verdict was directed, though the arbitrator had not authority to alter that verdict.] Mere submission before a judge is sufficient to bind the parties; *Harrison v. Wright*, 13 M. & W. 816.† Besides, the costs of the indictments were referred; and that was a matter still in the Court.

*540] *The part of the rule which seeks to set aside the verdict cannot be supported, and is abandoned. *Cur. adv. vult.*

PATTERSON, J., in the ensuing vacation (February 26th), delivered the judgment of the Court.

This was a motion for an attachment for revoking a submission to arbitration under an order of *Nisi prius*, afterwards made a rule of Court, and for costs; or to set aside a verdict of Not guilty taken at the trial, and issue a writ of *procedendo*.

There were two indictments: one for conspiracy; the other for perjury. The prosecutor and a brother of the defendant had been partners; but their partnership was dissolved in 1843; and proceedings

took place in Chancery, which led to the indictments. At the trial, in June, 1848, a verdict of Not guilty was taken by consent; and, by an order of *Nisi prius*, the several indictments and all matters in difference between Triston (the prosecutor) and the defendant were referred to an arbitrator; but no power was given to him to alter the verdict. After various attendances, the defendant, on the 30th June, 1849, revoked the submission. The latter part of this rule certainly cannot be maintained. The verdict of Not guilty was right; for no evidence was offered; and, whatever were the reasons for its not being offered, the Court cannot interfere with it. That verdict standing, as it must, it is plain that the indictments were not in truth referred by the order of *Nisi prius*, although the order professes to refer them; for they were at an end by the verdict.

It is said that the costs were referred: and, certainly, in the order it is stated that the costs of the indictments *should be in the discretion of the arbitrator. Now, whatever power might be given over the costs, supposing the order to be good, it is plain that, if the arbitrator gave them to the prosecutor, they could not be enforced under the indictments while the verdict of Not guilty remains, and must be enforced under the award when made, and under that alone: so that in truth the reference of the costs cannot be treated as an actual reference of the indictments: and, as they were not referred, there is nothing illegal in the reference, unless it was made upon a corrupt agreement to stifle the prosecutions; for which objection there is no ground whatever upon the present occasion.

We think it quite clear that the indictment for perjury could not legally be referred: and we do not mean to lay down as law that the indictment for conspiracy could, though such reference did take place in *Rex v. Bardell*, 5 A. & E. 619 (E. C. L. R. vol. 31), in which case no objection was taken on that ground, and in which case the jury were discharged. The rule is correctly stated by GIBBS, C. J., in *Baker v. Townshend*, 1 B. Moore, 120, 124 (E. C. L. R. vol. 4), S. C. 7 Taunt. 422 (E. C. L. R. vol. 2): "Where a party injured has a remedy by action as well as by indictment, nothing can deter such party from referring the adjustment of the reparation which he is to receive to arbitration, although a criminal prosecution might have been commenced." It should also be added "with leave of the Court." When a verdict of Guilty is taken, and the Court suspend judgment, and allow the questions between the parties to be referred, the matter is very different; for then it is only to enable the Court the better to see what sentence and judgment ought to be *given. However, as we have already said, the indictments in this case not being referred, there is no illegality in the reference.

What then was referred? All matters in difference between the parties, those matters not being the subject of any proceedings in the

Court. The instrument of reference must be treated either as an order of *Nisi prius*, or as an agreement under the statute 9 & 10 W. 3, c. 15. If it be treated as an order of *Nisi prius*, it may be doubted whether it is valid; for it embraces nothing which was before the Court, or the subject of any proceeding in it, except the costs, on which we have already observed. Assuming, however, that it was valid, still the defendant was entitled at common law to revoke the submission; and, as the order was certainly not made *in an action*, this power of revocation is not taken away by stat. 3 & 4 W. 4, c. 42, s. 39, as was decided in *Rex v. Bardell*, 5 A. & E. 619 (E. C. L. R. vol. 31). The revocation would therefore be valid; and the only question will be, whether the defendant ought to be attached for contempt of Court in revoking the submission after it was made a rule of Court. If the instrument be treated as an agreement under stat. 9 & 10 W. 3, c. 15, then the statute 3 & 4 W. 4, c. 42, does apply, and the revocation being wholly void and inoperative, the present rule would be quite unnecessary.

The instrument in question has none of the formalities of an agreement under the statute; it is not signed by the parties or their attorneys; it is not witnessed by any one; it is in the ordinary form of an order of *Nisi prius*; it has been treated as such, being made a rule of *548] *Court without any affidavit by a witness to its execution, and on the mere reading of it, as an order of *Nisi prius*. On the argument, indeed, it was said that every order of *Nisi prius*, when a cause and all matters in difference are referred, has a double aspect; that, as to the cause, it is an order of the Court; and as to the matters in difference, an agreement under the statute. The point has however never been determined: all that has been determined is, that in such a case the Court will generally, in its discretion, give the same time for moving to set aside the award as if it had been a reference under the statute. We believe that, at common law before the statute, when there was a cause in Court, it might be referred by order or rule of Court, and other matters in difference, not included in the cause, might have been and were tacked on by consent; and the arbitration became binding as to them as well as the cause: but, whether that be so or not, we do not feel justified in saying that this instrument, on the face of it an order of *Nisi prius*, can be construed to be a submission or reference within the second clause of stat. 3 & 4 W. 4, c. 42, s. 39, so as to render it irrevocable.

Several technical objections, as to the enlargement of the time, and other matters, were taken on the argument; and facts were relied on, as disclosed by the affidavits, to show that the defendant had good ground for revoking the submission; which facts were explained and answered by the other side: but we do not think it necessary to enter further into those matters.

Entertaining, as we do, considerable doubt whether the order of *Nisi*

prius was good, because there was nothing before the Court to be referred; at the same *time recollecting the case of *Harries v. Thomas*, 2 M. & W. 32,† where a reference took place at nisi [*544 prius of all matters in difference, at the same time that the cause itself was determined by withdrawing a juror, and on subsequent motions no objection was taken as to the goodness of the order of nisi prius; and considering all the circumstances of this case, we do not think that it is one in which we ought to treat the revocation by the defendant as a contempt of the Court.

The present rule, therefore, must be discharged, but without costs.

Rule discharged without costs.(a)

(a) The latter part of this case is reported by C. Blackburn, Esq.

See the next case.

The following case, decided in Michaelmas term, 1850, may conveniently be added here.

The QUEEN, on the Prosecution of The Rev. HUMPHREY SANDFORD, v. ROBERT BAUGH BLAKEMORE, Esquire. Nov. 21.

Indictment for non-repair of a public highway, alleging liability *ratione tenuræ*. The record (removed into Q. B.) was made up for trial: but, before a jury was impannelled, the prosecutor and defendant agreed upon leaving the question of liability to reference; and they did accordingly, by agreement of reference, submit all matters in difference relative to the subject-matter of the indictment to a barrister, who was to have the same powers in all respects as the Judge of assize at Nisi prius would have had upon the trial; and a verdict was to be entered according to the result of such award, on the application of either party. It was agreed that the submission should and might be made a rule of Court, if the Court should so please.

Held: that the agreement was illegal, as referring an indictment to arbitration; and, an award having been made, the Court refused, on motion, to order payment of costs in pursuance of the award, though the submission had been made a rule of Court according to the agreement. Per Lord CAMPBELL, C. J. The matter in difference was not legally a subject of reference, the question as to liability being of public concern.

BRAMWELL, in this term, obtained a rule calling on the defendant to show cause why he should not be ordered to pay to the prosecutor 79l. 4s. 9d. for *costs, pursuant to the award, rule of Court, and [*545 allocatur, after mentioned. The following facts appeared on affidavit.

At the Shropshire October Sessions, 1849, a bill was found against the defendant for non-repair of a public highway, which he, as it was alleged, ought to have repaired *ratione tenuræ*. The indictment was removed by certiorari, and the record made up for trial at the Shrewsbury Spring assizes, 1850; but the record was not entered for trial, nor was a jury impannelled, in consequence of the prosecutor and defendant "having determined upon leaving the question of liability of

repair of the portions of the highways indicted to reference." The reference was agreed upon and entered into without leave of the Court or the Judge of assize, or consent of the Attorney-General:

The agreement of reference began: "In the Queen's Bench. The Queen, on the prosecution," &c. "Whereas the said R. B. Blakemore has given notice of trial at the assizes," &c., "of a certain indictment," &c., "for non-repair of two portions of a certain highway situate in the parish of St. Chad, in the county of Salop: Now, for the purpose of putting an end to the said trial, and for divers other causes them thereunto moving, it is hereby mutually agreed between the said H. Sandford and R. B. Blakemore that all matters in difference in relation to the subject-matter of the said indictment shall be referred to the award, order, and arbitrament of Uvedale Corbett, of," &c., "barrister at law, so as he shall make," &c.: award to be made on or before 1st July then next: all necessary steps to be taken for respiting the recognisances, with consent (which was given) of the prosecutor: no advantage to *546] be taken by either party from the record not being entered and trial proceeded with at the present assizes: notice of trial to be considered as countermanded by defendant with prosecutor's consent. And it was further agreed "that each party shall deliver his brief to the other party on or before," &c., and "shall be at liberty to produce before the said arbitrator all books, deeds, papers, and writings in his custody," &c.; "and that, within seven days after such delivery as aforesaid, the briefs shall be respectively returned with the observations of the opposite party, and transmitted by each party without addition or alteration to the said arbitrator: and the said arbitrator shall be at liberty to decide thereupon without requiring further evidence; or, if the said arbitrator shall require further evidence, he shall appoint a day by giving or sending notice," &c: "and the said arbitrator shall be at liberty to call for any evidence he may deem necessary: but no evidence shall be received except such as shall be mentioned or referred to in the respective briefs, unless so called for by the said arbitrator;" witnesses to be examined upon oath; power to the arbitrator to proceed ex parte on default of appearance. "And the said arbitrator shall make such award, upon the evidence to be adduced before him, as he shall think fit, and a verdict shall be entered according to the result of such award, on the application of either party. And the said arbitrator shall have all such and the same powers, authorities, and jurisdiction in all respects (so far as he lawfully can and may), whether in respect of costs or otherwise, as the Judge of assize at Nisi prius would have had upon the trial of the said indictment at the present assizes for the county of Salop, pursuant to the statutes in *such case made and provided." *547] Proceedings were to be stayed till 1st July then next; if no award should have been then made, each of the parties to be at liberty to proceed at law or in equity: and it was agreed that this submission

may be made a rule of Her Majesty's Court of Queen's Bench, the Court shall so please."

taken on the indictment. On June 12th, 1850, the Court made a rule of Court. On June 17th, 1850, the arbitrator: whereby, after reciting the agreement of the parties had exchanged their briefs and sent the arbitrator with their observations, and with such books, to them seemed meet, and that he did not require any evidence, he awarded as follows. "I do award," &c., "that R. B. Blakemore is Guilty of the charges contained in the said indictment for the non-repair of the said two portions of the said highway therein charged; and that the said H. Sandford be at liberty to enter a verdict of Guilty against the said R. B. Blakemore thereon; and that the said R. B. Blakemore do, within two months from the date of this my award, put the said two portions of the said highway in the said indictment mentioned into good and proper repair. And I do further award, order, and adjudge that the defence of the said R. B. Blakemore to the said indictment is frivolous and vexatious: and that the said R. B. Blakemore do pay to the said H. Sandford his costs incurred in and about the said indictment, except so far as may relate to the removal of the same by certiorari into the said Court of Queen's Bench; such costs to be first taxed by the proper officer."

*It was further stated, in the affidavits on behalf of Blakemore, that, on July 17th, William Tate, of, &c., "as the attorney or agent of the said H. Sandford, delivered a bill of costs, entitled in this prosecution, and 'costs of the prosecutor,' to the agent or attorney" of Blakemore; which bill amounted to 97*l.* 15*s.*, and contained charges in respect of an information and summons against Blakemore and an order to indict him for the non-repair, and other matters relative thereto; also charges "for and in respect of the aforesaid submission and award; but no side bar or other rule was obtained to tax the said costs," as R. B. Blakemore has been informed and believes. And that, before taxation of the said bill, namely, on or about 22d July, 1850, notices, purporting to be signed by Blakemore's attorney, were served on the prosecutor, his attorney and agent, stating that Blakemore had been advised that the submission to reference was illegal, and the award invalid, inasmuch as the indictment could not legally be a subject of reference, especially as it had been made without the sanction of a Judge of assize; and that the Court would be applied to in Michaelmas term to set the submission and award aside. The prosecutor's attorney proceeded with the taxation, an agent attending before the Master on behalf of the defendant, and protesting; and the Master made his allocatur: "Allowed for costs, 79*l.* 4*s.* 9*d.*" This included costs of the reference and award. The affidavit further stated that the costs were afterwards demanded of the defendant by an attorney, son of the prose-

cutor, who produced a copy of the award and rule of Court, and the allocatur (but not any power of attorney from the prosecutor to demand *549] the costs), *and who was not named on the record as the prosecutor's attorney. The *Nisi prius* record remained in the possession of the defendant's attorney; but no application was made to him to deliver it up that a verdict might be entered upon it in pursuance of the award; and no entry of a verdict or judgment appeared in the books at the Crown Office; nor had any judgment been signed or verdict entered.

Whateley now showed cause.—First, the order of reference professes to give an arbitrator the power of deciding on a criminal charge. The result of such a charge is matter of public concern, and cannot be referred by private agreement. This point has been considered by the Court in several late cases, the effect of which is that, although, in some cases of misdemeanor, the parties may refer so much of the subject-matter as does not affect public interests, they cannot privately suppress the prosecution itself, nor make the event of it determinable by an arbitration; nor can they legally compromise it at all without leave of the Court; *Rex v. Bardell*, 5 A. & E. 619 (E. C. L. R. vol. 31); *Keir v. Leeman*, 6 Q. B. 308 (E. C. L. R. vol. 51); (a) *Regina v. Hardey*, ante, p. 529. Further, there is no mutuality in this agreement of reference; an award of Guilty would bind the defendant; but an award of Not guilty would be no defence to him, on an indictment by other parties than the present prosecutor; *Rex v. Cotton*, 3 Camp. 444: the agreement therefore was invalid; *Biddell v. Dowse*, 6 B. & C. 255 (E. C. L. R. vol. 13); *Thorp v. Cole*, 2 Cro. M. & R. 367, † S. C. 5 Tyr. 1047. *Whateley* also contended: That there was no power *550] *to tax costs for the prosecutor under stat. 5 & 6 W. 4, c. 50, s. 98, the indictment not having been tried; for that taxation must be preceded by a verdict: That the proper course was, for the Judge trying the cause to certify, and a side-bar rule to be taken out for costs; *Regina v. Clifton*, 6 T. R. 344; *Regina v. Pembridge*, 3 Q. B. 901 (E. C. L. R. vol. 43): That the submission could not be considered as a reference merely of matters in dispute, within stat. 9 & 10 W. 3, c. 15, that act relating to civil disputes only, and not to matters which could be the subject of an indictment; *Watson v. McCullum*, 8 T. R. 520, and (an analogous decision) *Rex v. Bardell*: Also that the Master had at any rate exceeded his authority in giving costs of the reference and award; *Rex v. Moate*, 3 B. & Ad. 237 (E. C. L. R. vol. 23): And that the costs had not been properly demanded. [COLERIDGE, J.—Is there any authority for setting aside a rule of Court, when such rule has been actually made with consent of parties? This difficulty did not exist in *Rex v. Bardell*, and *Keir v. Leeman*. Lord CAMPBELL, C. J.—If you are not precluded from your objection by the stage of the

(a) Judgment affirmed in Exch. C.; *Keir v. Leeman*, 9 Q. B. 371 (E. C. L. R. vol. 58).

case in which it is taken, *Keir v. Leeman* is a strong authority for you.]

Bramwell, contra.—By the agreement in question the indictment is not referred, but only the matters in difference: therefore the judgment in *Regina v. Hardey* is a direct authority here in favour of the prosecutor. (He then read the judgment, from “When a party injured” to “proceedings in the Court.”) *[COLERIDGE, J.—There the [*551 verdict stood, whatever the award might be on the matters referred.]. Here the agreement does not empower the arbitrator to direct a verdict. [Lord CAMPBELL, C. J.—It is that “a verdict shall be entered according to the result of such award, on the application of either party.”] The Court will construe the instrument so as to make it legal; the meaning is, that a verdict shall be so entered if the Court think fit. [WIGHTMAN, J.—In *Regina v. Hardey* the indictment was at end. Can you say here that, in effect, the indictment is not referred? COLERIDGE, J.—There a civil dispute was depending: but the parties had commenced criminally; and the criminal proceeding was determined.] It is true that the indictment might now be gone on with, and the public has an interest in the prosecution: but the matter referred is such as might lawfully have been submitted to arbitration, though there had been no indictment. [Lord CAMPBELL, C. J.—Would an action have lain on this agreement?] It would. [Lord CAMPBELL, C. J.—How do you get over the case of *Keir v. Leeman*?] There the indictment was in express terms compromised. [Lord CAMPBELL, C. J.—Here the agreement is that a verdict “shall be entered” according to the award. ERLE, J.—Your present motion assumes that the verdict has been so entered.] If the matter in dispute might lawfully be referred, the addition of the clause for entering a verdict does not make the agreement illegal. (*Bramwell* was not heard on the other points.)

Lord CAMPBELL, C. J.—I am sorry to say that I feel this objection to be conclusive. The opposition is *ungracious, as the parties submitted to the reference in good faith. But the agreement [*552 clearly refers the indictment as well as the subject-matter: and, therefore, according to *Keir v. Leeman*, it is an agreement which could not be proceeded upon by action, and the Court will not interfere summarily to enforce it. And, if we apply the criterion, whether the subject-matter of litigation is one for which the party injured had a remedy by action as well as by indictment,(a) we find that the matter was not the subject of a civil action; the question being whether the defendant was liable *ratione tenuræ* to repair a public road.

COLERIDGE, J., concurred.

WIGHTMAN, J.—I am of the same opinion. The only important

(a) *Baker v. Townshend*, 1 B. Moore, 120, 124 (E. C. L. R. vol. 4), S. C. 7 Taunt. 422 (E. C. L. R. vol. 2).

question is, whether the indictment itself was referred, and not the subject-matter.

ERLE, J., concurred.

Rule discharged.

It has been held in Pennsylvania that prosecutions for assaults and batteries may be the subject of reference by the parties. But in that state there is an act of Assembly which authorizes the settlement of such prosecution by agreement between the prosecutor and the defendant: *Noble v. Peebles*, 13 Serg. & Rawle, 319.

SARAH MARY HOARE v. COUPLAND. Jan. 14.

A plaintiff suing in formâ pauperis and obtaining a verdict is entitled to have judgment signed without payment of fees, though the verdict be for more than 5*l*.

IN this case the plaintiff, who sued in formâ pauperis, obtained, on the trial before Lord DENMAN, C. J., a verdict for 50*l*., subject to a bill of exceptions tendered by the defendant. The Master, as the plaintiff had obtained a verdict, refused to sign judgment unless the plaintiff paid the usual fee of 8*s*. The plaintiff made an affidavit that she had not 8*s*. in the world.

*553] **Carter* now moved for a rule calling on the Master to sign judgment without payment of the fee.—The Master has no personal interest in the matter, as the fees now go to the Consolidated Fund; and he will, no doubt, obey at once whatever direction the Court gives. It seems, in general, that, where the plaintiff sues in formâ pauperis and recovers more than 5*l*., the fees are paid, and ultimately recovered from the defendant; and, when the attorney chooses to advance the money, there can be no objection to his doing so. But the attorney may not choose to advance the fees; or the plaintiff may sue in person; and, if, as in the present case, the pauper has not the means to pay the money, what is to be done? The express words of stat. 11 H. 7, c. 12, are that the poor person shall have the requisite writs, &c.: “therefore nothing paying.” The notion that the payment of the fees on obtaining a verdict was not by the voluntary courtesy of the attorney, but a matter of obligation, is recognised by WILLIAMS, J., in *James v. Harris*, 7 C. & P. 257 (E. C. L. R. vol. 32), but is discountenanced by PARKE, B., in *Gougenheim v. Lane*, 4 Dowl. P. C. 482.(a)

[*Per Curiam*.—The officers of this Court tell us that the practice has been uniform to exact payment of the fees after a verdict has been obtained for more than 5*l*. We will consult the other Judges, and give directions to the Master.]

Cur. adv. vult.

PATTESON, J., on a subsequent day in the term (January 24th), delivered judgment.

(a) S. C. (not S. P.) 1 M. & W. 136;† Tyr. & G. 216.

*The question was, whether the Master was entitled to refuse to sign judgment unless the plaintiff, who sued in formâ pauperis, paid the usual fee, she having obtained a verdict for 50*l*. The usual course in such cases has been that the pauper pays the fees, and has them allowed in taxation of costs against the other party; but the question is, not whether that is a proper course, but whether the pauper can be compelled to pay the fees; and we think not. It is the right of a person suing in formâ pauperis to have judgment signed without payment. As in this case a bill of exceptions has been tendered, the plaintiff must take care how she acts on this judgment till that is disposed of; but we direct the Master to sign judgment gratis.

Direction accordingly.(a)

(a) Reported by C. Blackburn, Esq.

In the Matter of WILLIAM DIMES. Jan. 12.

Habeas corpus ad subjiciendum. Return: Committal by order of the Vice-Chancellor of England, for breach of an injunction ordered by the Lord Chancellor. The order was signed C. C., which, it was suggested, were the initials of "COTTENHAM, Chancellor." On motion on behalf of the prisoner for time to file affidavits, for the purpose of showing that Lord COTTENHAM had a personal interest in the cause, and therefore, as the prisoner contended, that his injunction was void:

Held, That the Court will not grant time to file affidavits, for the purpose of disclosing matters not apparent on the return to a habeas corpus, unless the nature of the facts to be sworn to is suggested, and it appears such affidavits might be available.

And in this case liberty to file the proposed affidavits was refused, as the order of committal was that of the Vice-Chancellor, who had jurisdiction to decide whether there was proper ground for a committal, and this Court could not review such decision.

SIR F. THESIGER, in this term,(a) moved for a habeas corpus directed to the keeper of the Queen's prison, to bring up the body of William Dimes, with the cause of his detention.

The case on the affidavits in support of the *application was, that Mr. Dimes had obtained a judgment in this Court against [555] The Grand Junction Canal Company(b) in an action of ejectment, for a portion of the canal. The Company filed a bill in Chancery against Mr. Dimes, in the ordinary form, for an injunction to restrain him from interrupting the navigation over that part of the canal. On this bill the Vice-Chancellor of England (Sir LAUNCELOT SHADWELL) made an ex parte order for an injunction, which by a subsequent order he continued.(c) Mr. Dimes appealed; and, on a rehearing, the Lord Chancellor (Lord COTTENHAM) made an order for an injunction, varying in some respects the order of the Vice-Chancellor.(d) After the Lord

(a) January 14. Before PATTESON, COLERIDGE, and WIGHTMAN, Js.

(b) See *Dimes v. Grand Junction Canal Company*, 9 Q. B. 469 (E. C. L. R. 58); *Doe dem. Dimes v. Grand Junction Canal Company*, 9 Q. B. 518, note (a).

(c) See *Grand Junction Canal Company v. Dimes*, 15 Sim. 402.

(d) *Grand Junction Canal Company v. Dimes*, 17 Law J. N. S. (Chanc.) 206.

Chancellor's order had been made, Mr. Dimes discovered that Lord COTTENHAM was a shareholder in The Grand Junction Canal Company. As soon as Mr. Dimes ascertained this, he took steps to have the cause in equity between him and the Company reheard before an uninterested tribunal; but without success.^(a) He now made affidavit to his belief that the injunction, granted by Lord COTTENHAM in a cause in which he had a personal interest, was void; and that to raise that question he had acted in breach of the injunction; for which he was committed, by an order made in Chancery and signed by the Lord Chancellor.^(b)

Sir *F. Thesiger* (in support of the application) contended that the *556] Lord Chancellor, being a member of *the Company who were plaintiffs before him, and having a direct pecuniary interest in the event of the cause, was virtually a party to the suit; his injunction, therefore, was absolutely void; and the commitment of Mr. Dimes for disobeying it illegal. It is one of the fundamental rules of justice that a man shall not be judge in his own cause; *Great Charte v. Kennington*, 2 Stra. 1173. In 2 Rolle's Abridgment, 93, tit. *Judges* (A), pl. 11, it is said, "Si le Seigneur Chancellor fait un decree enter 2 estrangers en un chose que concern luy mesme en interest, et pur luy mesme, ceo est void pur ceo que il ne poet estre un Judge en son cause demesne:" and a case in Chancery is cited "enter Sir J. Egerton et le Seigneur de Derby, et Kelley resolve per le Seigneur Chancellor COKE et DODDERIDGE:" This is precisely in point. The case referred to by Rolle is reported as the Earl of Derby's Case, 12 Rep. 114. The principle is laid down in Littleton, sect. 212: "It is against reason, that if wrong be done any man, that he thereof should be his own judge." "For" (says Lord COKE,^(c)) "it is a maxim in law, aliquis non debet esse judex in propriâ causâ. And therefore a fine levied before the bailiffs of Salop was reversed, because one of the bailiffs was party to the fine, quia non potest esse judex et pars." This principle has very often been acted on with respect to inferior courts. In an Anonymous Case^(d) in Salkeld, it is stated by HOLT, C. J., that the Mayor of Hereford was laid by the heels, for sitting in judgment in his own cause. The principle was acted on in *Regina v. The Cheltenham Commissioners*, 1 Q. B. 467 (E. C. L. *557] R. vol. 41), and *Regina v. The Justices of *Hertfordshire*, 6 Q. B. 753 (E. C. L. R. vol. 51). There is indeed one exception, which is alluded to in *Great Charte v. Kennington*, 2 Str. 1183, and again by Lord DENMAN, C. J., in *Carus Wilson's Case*, 7 Q. B. 984, 1015 (E. C. L. R. vol. 53): it is necessary, in some cases, that an interested party should act as judge when no one else can; under such circumstances "it becomes the unfortunate duty of a Court to act both as party and judge." But no such necessity existed in the present case. The Com-

(a) See *The Grand Junction Canal Company v. Dimes*, 12 Beav. 63; *Same v. Same*, 2 Macn. & G. 285.

(b) See the form of the order post, p. 558.

(c) Co. Litt. 141 a.

(d) 1 Salk. 396.

pany, who were the plaintiffs in the equity suit, knew that the Lord Chancellor was one of them; and it was their duty to have sued in the manner provided by law in such a case. The proper course is pointed out in Mitford on Pleading, p. 7, 5th ed. It is to frame the bill before the Queen, and sue, exactly as if the office of Chancellor were vacant. As they did not do so, the Chancellor himself should have declined to decide. When *Dimes v. Grand Junction Canal Company*, 9 Q. B. 469 (E. C. L. R. vol. 58), which was part of this suit, came on to be argued in error in the Exchequer Chamber, ALDERSON, B., who was one of the Judges of that Court, stated that he was a shareholder in the Company, and for that reason left the Court. This is not noticed in the report of the case. [WIGHTMAN, J.—I think this is the proper time to state that I also am a shareholder in The Grand Junction Canal Company: and, as my brothers PATTESON and COLERIDGE are not, I think it better to take no part in this case. PATTESON, J., inquired whether the warrant of committal was that of the Lord Chancellor or of the Vice-Chancellor.] It is a warrant(a) signed by the Lord Chancellor, and is for a *contempt by breach of the injunction made by the Lord Chancellor. It issued in pursuance of an order of the Vice-Chancellor; but he expressly declined to consider the question of the validity of the Lord Chancellor's order, because he was the Chancellor's deputy.

Per Curiam.(b)—Let a writ go. The question may be considered on the return.

The prisoner was now brought into Court; and the Keeper's return was read, stating: "that, before the coming of the Queen's writ of habeas corpus to me directed, and which is hereunto annexed, to wit, on the 11th day of January, 1850, William Dimes in the said writ named was brought into my custody by virtue of an order of the High Court of Chancery, bearing date the 10th day of December, 1849, made by the Right Honourable Sir LAUNCELOT SHADWELL, Knight, then being Vice-Chancellor of England, and of which order the following is a copy.

"Vice-Chancellor of England.

Mr. Munro,
Registrar.

C. C.

Monday, the 10th day of December,
in the thirteenth year of her Majesty Queen Victoria, 1849.

Between the Company of Proprietors
of the Grand Junction Canal, plain-
tiffs; and William Dimes and
others, defendants.

Whereas Mr. *Stuart*, Mr. *J. Parker*, and Mr. *Busk*, of counsel for the plaintiffs, this day moved and offered divers reasons unto this Court

(a) See the form, post, p. 558.

(b) PATTESON and COLERIDGE, Js.

*559] that the defendant *William Dimes might stand committed for a breach of the injunction issued in this cause on the 6th day of July, 1839, in pursuance of the order of the 15th day of June, 1838, and continued by orders dated the 26th day of June, 1838, and the 15th day of December, 1838, and made perpetual by the decree made in this cause on the 16th day of November, 1846; and that the said defendant might be ordered to pay the costs of the application," &c. "Whereupon, and upon hearing the said writ of injunction," &c., "the affidavits," &c., "read, and what was alleged by the counsel for the plaintiffs and for the said defendant, this Court doth order that the said defendant W. Dimes do stand committed to the custody of the Keeper of the Queen's Prison until the further order of this Court, for his contempt in disobeying the writ of injunction issued in this cause on the 6th day of July, 1839, in pursuance of an order of this Court dated the 15th day of December, 1838. And it is ordered that the said defendant W. D. do pay to the plaintiffs their costs of this application" to be taxed, &c. (L. s.).

"C. M. Entered. E. R. for J. S.'

"And this, &c."

Sir *F. Thesiger*, for the prisoner, applied for time to file affidavits for the purpose of bringing before the Court facts not apparent upon the return.

Sir *John Jervis*, Attorney-General, contra.—Affidavits may in some possible cases be admissible: but as it is not every affidavit that can be used, the party who applies to the Court for delay ought to suggest *560] what is the nature of the affidavits he proposes *to file, that the Court may judge whether they can be available.

Sir *F. Thesiger*.—As it is conceded that there may be some affidavits admissible, it follows that the prisoner is entitled to file his affidavits; when they are before the Court it may be argued that they are not such as can be used: at present it is premature to discuss that point. [PATTERSON, J.—If that were so, liberty to file affidavits must be granted in all cases when applied for. That might lead to much delay.] The application can be made only by the person in custody, who is the party prejudiced by delay. There is, however, no unwillingness in the present case to state the nature of the proposed affidavits. Affidavits may be used to impeach the legality of the detention by showing extrinsic collateral facts, consistent with the truth of the return. Here the prisoner proposes by affidavits to admit that the Lord Chancellor did make the order, but to show the collateral extrinsic fact that he was an interested party, and therefore without jurisdiction. In the case *In the Matter of Clarke*, 2 Q. B. 619, 634 (E. C. L. R. vol. 42), PATTERSON, J., says: "There is no case in which a party has been allowed in this way directly to contradict facts set forth in an order. All that the Courts have permitted has been to allege a collateral extrinsic fact, con-

fessing and avoiding, as it were, the disputed order." And in the Case of the Sheriff of Middlesex, 11 A. & E. 273 (E. C. L. R. vol. 39), the distinction was pointed out between affidavits showing that there was no jurisdiction to commit, which might be used, and the affidavits in that case, which merely *went to show that the jurisdiction had been abused. In Carus Wilson's Case, 7 Q. B. 984 (E. C. L. R. vol. [*561 53), the affidavits which were refused traversed the return. These authorities all recognise the propriety of admitting affidavits to confess and avoid, as it were, the return to a writ of habeas corpus either at common law or under stat. 31 C. 2, c. 2. But, if the present writ be, as it is, within stat. 56 Geo. 3, c. 100, the prisoner may, by the express enactment of that statute (s. 3), controvert even the truth of the return by affidavits; Ex parte Beeching, 4 B. & C. 136 (E. C. L. R. vol. 10). It is not however intended to dispute the return, but to show want of jurisdiction. In a recent case, not reported, where the prisoner was convicted of smuggling by the justices of Kingston upon Hull, affidavits were used to show that the alleged smuggling was locally beyond the jurisdiction of the convicting justices.

Sir J. Jervis (Attorney-General), *contra*.—The question whether delay for the purpose of filing affidavits may be obtained as a matter of course is of some importance. It is not necessarily the prisoner who is prejudiced by delay. The same rule must apply in all cases: a prisoner under sentence of transportation, for instance, has a strong interest in causing delays. But in this case the point does not arise, as the nature of the proposed affidavits is stated. Assuming that the affidavits would show that the Lord Chancellor was a shareholder in the Company, this could not avail. It is clear that this Court cannot directly review the decision of the Court of Chancery. Can it then do so indirectly, on a return to a writ of *habeas corpus? In a [*562 superior Court an objection to the jurisdiction ought to be taken in the Court itself; and, if that Court overrule it improperly, the remedy is in a Court of Error, not in a co-ordinate Court. The proposed affidavits are to be used as the foundation of an argument that an objection in the nature of a plea to the jurisdiction of the Court of Chancery has been improperly overruled. Suppose there had been an appeal to the House of Lords on this ground, and the House of Lords had decided that there was nothing in the objection; and suppose that this writ of habeas corpus were returnable before a single Judge at Chambers: could affidavits be received there by the single Judge to enable him to decide whether the House of Lords had acted without jurisdiction? There is no distinction in principle between that and the present case. [PATTESON, J.—The question, whether this Court can decide that the Chancellor acted out of his jurisdiction, hardly arises yet. We are now hearing you on the point whether affidavits can be received to raise that question.] All the cases agree that such affidavits

*559] that the defendant *William Dimes might stand J. B. 633 (E. breach of the injunction issued in this cause affidavits were July, 1839, in pursuance of the order of the 15th order elsewhere and continued by orders dated the 26th day of July. They could not be day of December, 1838, and made perpetual. It was adjudged to be the cause on the 16th day of November, 1846. No opinion of any competent ant might be ordered to pay the costs, or to give it jurisdiction, is "Whereupon, and upon hearing the affidavits, this Court in effect "the affidavits," &c., "read, and the affidavits be received to show that the for the plaintiffs and for the said defendant, against law when they adjudged the the said defendant W. Dimes do as in Brennan's Case, 10 Q. B. 492 (E. C. Keeper of the Queen's Prison. It was used to receive affidavits that the Royal his contempt in disobeying the Court to sentence the prisoner to transportation. the 6th day of July, 1839. which is by sect. 1 confined to cases "where any the 15th day of December. It is by sect. 1 confined to cases "where any ant W. D. do pay to the costs of the proceedings in any criminal or restrained of his or her liberty (otherwise be taxed, &c. (L. s. 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

Sir F. Theiger. It is claimed to be heard on the same side.—(Sir F. Theiger. for the purpose of the return. It is a preliminary point it is never the practice to hear more than one

Sir Jo. [PATTERSON, J.—We need not consider whether more counsel possible to be heard; for at present we are all of opinion that this used, must be read as returning a committal by the Vice-Chancellor, and consequently that the proposed affidavits are irrelevant.]

*561 Sir F. Theiger then was called upon to support the motion.—The return shows that the warrant of commitment is signed by the Lord Chancellor himself, with his initials C. C., as is required by the act which creates the office of Vice-Chancellor. (b) Sir LAUNCELOT SHADWELL, when the motion was made to commit Mr. Dimes, (c) refused to entertain any question, on the ground that he was but an assistant to the Lord Chancellor, and had *no power to vary his decrees. It is not *564] correct to say that this Court cannot inquire whether the Chancellor acts out of his jurisdiction. If an action be brought against him, as in *Dicas v. Lord Brougham*, 1 M. & Rob. 309, or if the event of a cause between two suitors in this Court depends on the validity of one of his orders, as in *Christie v. Unwin*, 11 A. & E. 373 (E. C. L. R. vol. 39), (d) the Court must inquire into his jurisdiction. In *Christie v. Unwin*, his order in bankruptcy was impeached for want of jurisdiction. All that is now claimed is the opportunity to prove facts showing a want of jurisdiction to commit. The effect of proving these facts may be considered after the proof.

(a) See *Crawford's case*, 13 Q. B. 613 (E. C. L. R. vol. 69).

(b) Stat. 53 G. 3, c. 24, s. 2.

(c) Not reported.

(d) See *Gosset v. Howard*, 10 Q. B. 411, 444, 5 (E. C. L. R. vol. 59).

ADOLPHUS & ELLIS. N. S.
 I cannot doubt as to the course we ought to pursue. It is possible to read this return as the return of a committal by the Chancellor, Lord COTTENHAM. The return states that the order was made "by the Right Honourable Sir John Knight, then being Vice-Chancellor of England; and that the order is set out, which is headed "Vice-Chancellor of England." It is true that there are the letters "C. C." and it is stated that these are the initials of the Vice-Chancellor; and it may be that all orders of the Vice-Chancellor Court is a branch of the Court of Chancery, must be made by the Lord Chancellor; but still I cannot read the return as showing that the order, made in the Court of the Vice-Chancellor of England, was made by Lord COTTENHAM. Then, reading this return as showing a committal by order of the Vice-Chancellor of England; *and assuming all that it is proposed to show by the affidavit, namely that the committal was for a breach of Lord [*565 COTTENHAM'S injunction, and that he was interested; in what position are we? We are not called on to inquire whether the injunction ordered by the Chancellor is void; but whether the order of committal made by the Vice-Chancellor is valid. Now the Vice-Chancellor had authority to determine whether or not there should be a committal. He has so determined; and in doing so he has adjudged that there was a valid injunction, and a breach of it, such that for that breach the prisoner should be committed. If we entertain the question whether there was such a valid injunction, we directly review the judicial decision of the Vice-Chancellor. We can no more do this than the Court in the Case of the Sheriff of Middlesex could review the decision of the House of Commons.

If it had been alleged that the Vice-Chancellor himself was interested, the question would have been different; but the point before us is, not whether the injunction was valid, but whether the decision of the Vice-Chancellor as to its validity can be reviewed here. The return shows that the Vice-Chancellor heard and determined this; and, as it is a matter within his jurisdiction, his determination is final. The affidavits cannot be received.

COLERIDGE, J.—I am of the same opinion. Whether a writ of habeas corpus be at common law or within the provisions of stat. 56 G. 3, c. 100, it is not every affidavit that can be received on the return to the writ. Counsel, therefore, who apply for time to file *affidavits, [*566 must suggest to the Court the nature of the affidavits they propose to use, that the Court may see whether they could be used: and Sir F. Thesiger has properly stated the nature of the affidavits proposed to be used in this case. I am of opinion that such affidavits are not available. He proposes, not to contradict the return, but to bring before the Court facts showing, as he contends, a want of jurisdiction,

not in the Vice-Chancellor who made the order of committal, but in the Lord Chancellor, who issued the injunction for the breach of which the committal took place. If it were conceded to him that the case was as supposed, it would now be immaterial. When the allegation was made before the Vice-Chancellor that there was a contempt, this objection should have been taken; if it was then taken, the Vice-Chancellor then decided on it. The affidavits could but go to show that the Vice-Chancellor came to a wrong decision, in order to lead us to review his decision, which we have no power to do. Where the judgment complained of is in an inferior Court the case is different. We have before us the judgment in which the vice is alleged to be; and we have power to quash it; but we have not, in the present case, the injunction before us. *Christie v. Unwin*, which has been cited in the argument, does not bear on the present point. That was a case in which the Lord Chancellor was acting in a limited jurisdiction conferred on him by a statute; and the decision of this Court was that, when the Chancellor is acting in a capacity limited as to jurisdiction, it must be shown that he acted within his jurisdiction. In the present case the Vice-Chancellor is acting as a superior Court.

*567] *ERLE, J.*—I agree that the proposed affidavits cannot be received. The return shows a committal by a Court of competent jurisdiction, acting within its jurisdiction. The attempt is to show that that Court should not have adjudicated as it did. It has been decided by the Court of Common Pleas, and, if I am not mistaken, by the Court of Exchequer also, that the Courts of common law will not sit in review of a committal by the Court of Chancery.^(a) It seems to me that the objection raised here might have been taken in the Court of Chancery before the Lord Chancellor, and before the Vice-Chancellor: and that both of them have decided on it. Their decision cannot be reviewed here. I may observe that an inferior Court, such as the Court of Quarter Sessions, is a Court over which this Court has a controlling power, and whose proceedings are brought here by a writ of certiorari, in order that we may exercise that controlling power. In that respect such a Court differs from the Court of Chancery; and in that respect cases before us, which relate to the inferior Courts, are distinguishable from this.

Sir F. Thesiger then admitted that, if he could not bring the extraneous facts before the Court, the return was sufficient.

Prisoner remanded.^(b)

^(a) See *Regina v. Dean and Chapter of Rochester*, Easter term (April 30th), 1851. Post. Also *Ex parte Cobbett*, 5 Com. B. 418 (E. C. L. R. 57); *In re Cobbett*, 14 M. & W. 175.†

^(b) Reported by C. Blackburn, Esq.

See *Dimes v. Grand Junction Canal Company*, Dom. Proc., June 26 and 29, 1852.

***The QUEEN v. BRIER and Others. Jan. 14. [*568**

When an indictment at Sessions, under stat. 25 G. 2, c. 36, for keeping a disorderly house, has been removed by prosecutor or defendant into the Central Criminal Court under stat. 4 & 5 W. 4, c. 36, s. 16, the opposite party may remove it again into this Court, notwithstanding stat. 25 G. 2, c. 36, s. 19.

A BILL was found against the defendants at the Middlesex Quarter Sessions, December 5th, 1849, for keeping unlicensed rooms, called the Argyle Rooms, contrary to stat. 25 G. 2, c. 36. The prosecutor removed the indictment to the Central Criminal Court by certiorari under stat. 4 & 5 W. 4, c. 36, s. 16; (a) and the defendants then obtained from PATTESON, J., at chambers, a certiorari to remove the case into this Court. They alleged as a ground for the application that a question would arise whether the rooms were, in point of law, kept for "public" purposes within stat. 25 G. 2, c. 36, s. 2. Sect. 10 of the same statute was not referred to.

M. Chambers now moved, on affidavit of these facts, and others not material to the present report, for a procedendo, to remit the case to the Central Criminal Court.—Stat. 25 G. 2, c. 36, s. 10, enacts that no indictment for keeping a disorderly house shall be removed by any writ of certiorari; "but such indictment shall be heard, tried, and finally determined, at the same general or quarter session or assizes, where such indictment shall have been preferred (unless the Court shall think proper, upon cause shown, to adjourn the same), any such writ or allowance thereof notwithstanding." This clause, intended to prevent delay in the suppression of public nuisances, must be read as *incor- [*569] porated in stat. 4 & 5 W. 4, c. 36. That act does not establish any new original jurisdiction as to offences like the present: its purpose, according to the title, is to establish "a new court" for "trial." Sect. 13 expressly forbids preferring at the Central Criminal Court any indictment for misdemeanor (except perjury or subornation), which might be found at the sessions for Middlesex, &c., unless the prosecutor shall have been bound by recognisance to prosecute at the Central Court, (b) or the defendant committed or bound over to take his trial there. Sect. 16 permits the removal of indictments from Sessions into the Central Court; but that is evidently for despatch, the sittings of the Court being (by s. 15) held twelve times a year. For that purpose the Central Court is substituted for the Quarter Sessions: the statute interferes with stat. 25 G. 2, c. 36, s. 10, to promote, but not to obstruct, despatch. If the present indictment may be removed into this Court notwithstanding the last cited clause, the rooms under prosecution may remain open for several months. There is no express decision bearing on this point; but the general rule is that acts in *pari materiâ*

(a) See note to *Still v. The Queen*, 1 E. & B. 553 (E. C. L. R. vol. 72).

(b) See stat. 9 & 10 Vict. c. 24, s. 2.

must have a combined operation. No instance has been found in which a second certiorari has been granted, removing a case to a third tribunal. [PATTESON, J.—I can see good reasons why an indictment of this kind might be removed from Sessions to the Central Court, and again why, being there, it should be carried to this Court at the instance of the defendant. Is there any instance in which the Court has interfered on affidavit where a certiorari has already been granted to a defendant, *570] and it is not questioned that the Court to which the removal *takes place has jurisdiction? The Master of the Crown Office says that an application, on the merits, to supersede a certiorari once granted, has always been refused.] It is not necessary to ground this application upon the matter stated on affidavit.

PATTESON, J.—I do not see how it is possible to read sect. 10 of stat. 25 G. 2, c. 36, as incorporated in the Central Criminal Court Act. That act, as to the Central Court, effects a sort of repeal of the former statute; for, by sect. 16, it provides generally that all indictments, found at Sessions for the cities and counties named, of offences cognisable under the act, may be removed by certiorari into the Central Court. Here the indictment has been so removed, at the instance of the prosecutor. As he has chosen to remove it, and the indictment is now in that Court, it struck me, on the present application, that the defendants might deal with it as if it had been found there. I do not say whether the prosecutor could have done so; because it might be objected that he had made an election. Nor do I pronounce as to the merits of this application. There is no dispute as to jurisdiction: and the indictment being once in the Central Court, there is an end of stat. 25 G. 2, c. 36, s. 10; and nothing prevents removing the indictment into this Court.

COLERIDGE, J.—I am of the same opinion. I say nothing on the merits of the application: but no fraud is alleged; the question is merely on the authority to remove. The indictment was in the Central Court when the present certiorari was obtained; and therefore sect. 10 of stat. 25 G. 2, c. 36, does not stand in the way; that applies only *571] to the session or assizes *where the indictment has been preferred. Once removed thence, the indictment is set quite free. It must always be remembered that the jurisdiction to remove into this Court exists unless expressly taken away.

WIGHTMAN, J.—Sect. 10 of stat. 25 G. 2, c. 36, does not require that we should remit this indictment to the Central Court; and it is not contended that we can remit it to the Court where the indictment was found.

Rule refused.(a)

(a) See *Regina v. Sanders*, 9 Q. B. 235 (E. C. L. R. vol. 58).

The QUEEN v. The Inhabitants of ST. GILES, CAMBERWELL.
Jan. 16.

By stat. 6 & 7 W. 4, c. cxxxvi., incorporating The London Cemetery Company, the Company were required periodically to appoint directors, who should manage the business and concerns of the Company (subject to their control), keep and use the common seal, have the custody of books, deeds, &c., call meetings, purchase and sell lands, appoint and displace chaplains and other officers, allow them stipends, take of them securities, make contracts touching the Company's undertaking, regulate the mode of interment and the disposition of vaults, catacombs, and graves, and the sums to be paid for exclusive right of burial therein and for placing monuments, &c., direct the issuing, receiving, and disposal of the Company's moneys, and all their other dealings, superintend their correspondence and the keeping of their accounts, and do all other things necessary for carrying on their business and maintaining actions or suits in their name in respect of debts or contracts, &c., relative to their moneys, &c., and making, enforcing, and rescinding contracts, &c.: Also auditors who should examine the report, to be made by the directors, of disbursements and receipts, audit the accounts from which the report was drawn, and inspect the vouchers, &c.

The Company had two cemeteries, in Middlesex and Surrey. The duties and authority of the directors extended to both.

On appeal by the Company against a poor-rate on one of the cemeteries:

Held, That they were not entitled to deduct from the rateable value under the Parochial Assessment Act, 6 & 7 W. 4, c. 96, s. 1, the salaries of the directors and auditors, and the expenses of an office, in London, at which the directors transacted the Company's business.

ON appeal (Surrey Michaelmas Quarter Sessions, 1848) by the London Cemetery Company against a rate for the relief of the poor of the parish of St. Giles, Camberwell, in the county of Surrey, by which the said Company were rated for lands, catacombs, vaults, and *other [*572 buildings, used as a Cemetery, and situate at Nunhead in the said parish, on the sum of 480*l.* rateable value, the Sessions reduced that amount to 377*l.*, subject to the opinion of this Court on the following case.

The London Cemetery Company is incorporated by an act of 6 & 7 W. 4 (c. cxxxvi., local and personal, public(a)), altered and amended by another act, of 6 & 7 Vict. (c. xxxvi., local and personal, public(b)), both which acts were to form part of this case. By the 51st and 52d sections of the above act of 6 & 7 W. 4, the Company was authorized to raise a capital of 100,000*l.*, to be divided into 5000 shares of 20*l.* each. And by the act of 6 & 7 Victoria (ss. 5, 9, 16), it was empowered to raise, by creating new shares, a further sum of 45,000*l.*; and, upon half of the sums so authorized to be raised by the said acts being paid up, to borrow the further sum of 15,000*l.*, or to raise the same or any part thereof by creating additional shares.

The Company is governed, and its affairs are administered, by a Board of Directors,(c) two *auditors, a secretary and office clerk, at an establishment in London for the general business of the [*573

(a) "For establishing cemeteries for the interment of the dead, northward, southward, and eastward of the metropolis, by a company to be called 'The London Cemetery Company.'" Sect. 1 makes them a corporation, with power "to purchase, hold, and sell lands," &c., for the use of the undertaking.

(b) For amending the former act.

(c) The directors were to be elected periodically. Stat. 6 & 7 W. 4, c. cxxxvi., s. 90, appoints certain persons as the first directors "to manage the affairs of the said Company." Sect. 91

*574] Company, in addition to a superintendent, chaplain, and the *necessary servants at each of the Cemeteries belonging to the said Company.

In pursuance of the power and authority given by the above acts, the Company have purchased lands for, and have established, two Ceme-

enacts: "That the business and concerns of the said Company shall be carried on under the management of the directors, subject to the control, orders, and directions of the said Company

be made at any general or special general meeting as aforesaid, and the directors for the time being shall have the custody of the common seal of the said Company, with power to use the same on the behalf of the said Company, and also the custody of the books, deeds, and papers, belonging to the said Company, and also to call special general meetings of the said Company for any purpose they may think proper, and (subject to the provisions of this act) to appoint the times and places of holding general or special general meetings, and shall have full power and authority to do all acts whatever which the said Company are by this act authorized to do (except as hereinafter mentioned) for the management and direction of the affairs of the said Company, and for that purpose to purchase lands, tenements, and hereditaments, for the purposes of this act, and to sell lands, tenements, and hereditaments hereby authorized to be sold, and to appoint and displace all ministers, chaplains, clerks, sextons, officers, and servants of the said Company (except the Treasurer," &c.), "and to allow to such officers and servants such stipends, salaries, gratuities, or recompenses, and take such security from them or any of them as to the said directors shall seem proper, and upon the death, resignation, or removal of any of the said officers or servants from time to time to appoint others in their respective places, and also to make contracts and bargains touching the said undertaking, and to regulate the mode of interment in the said cemeteries respectively, and the disposition of vaults, catacombs, and graves, and of the sums to be paid for the purchase of the exclusive right of burial or interment therein, or for the right or privilege of making or erecting vaults and graves, and of the sums to be paid for single interments, and for the privilege of placing monuments or tablets in the said chapel or chapels, or in any other part of the said cemeteries respectively, and shall have power to direct the issuing, receiving, and laying out, sale and disposal of the moneys of the said Company, and all the other dealings of the Company, and to superintend, direct, and control the correspondence and mode of keeping the accounts, and to do all other things necessary or deemed by them proper or expedient for carrying on the business and concerns of the said Company, and the bringing and maintaining any action or actions at law or suit or suits in equity in the name of the Company, for the recovery of any debt or debts to become due to the said Company in respect of any such sale or sales, or otherwise, and in making, enforcing, and rescinding, compounding, and compromising, all contracts and bargains touching or in any wise concerning the same, and to enforce, perform, and execute all the powers, authorities, privileges, acts, and things, in relation to the said Company, and to bind the said Company, except such as are hereby required to be done at some general or special meeting of the said Company; and the directors for the time being shall have power to frame rules and regulations, and to prescribe the orders and directions, for carrying on the business and concerns of the said Company, and alter and vary the same from time to time as they in their discretion shall think fit;" such rules and regulations to have the force of by-laws, provided they be not repugnant to this Act, &c.; "and that no individual proprietor, not being a director (except as hereinafter provided), shall have a right to any interference, management, direction, or control in or over the business or concerns of the Company, or the capital stock or effects thereof."

By other subsequent clauses the directors are authorized to deliver certificates of shares to proprietors; to make calls; to cause proper account books to be kept by persons whom they shall appoint; to cause yearly accounts to be made up, and report the disbursements and receipts at the annual general meeting of the Company; and to perform other specified duties.

Sect. 104 prescribes the duties of the auditors, who are to be periodically elected, as follows. "That the auditors of the said Company shall examine the report of the receipts and disbursements of the Company to be prepared by the directors of the said Company previously to the holding of the annual general meetings of the said Company as hereinbefore is provided, and audit the accounts from which such report shall or ought to have been drawn; and in order thereto the said auditors shall, with the assistance of the treasurer and clerks and other officers of the said Company, inspect and examine all the books, papers, and vouchers of the said Company, which they shall think necessary; and after a careful examination of such report with such books," &c., "and correcting or altering the same if necessary, such auditors shall,

teries, one at Highgate in Middlesex, and the other at Nunhead Hill in the parish of Camberwell in Surrey; which latter is the subject of the present case. The Cemetery at Nunhead *encloses fifty acres of land, for which the Company paid 15,000*l*. The land has been [*575 ornamentally laid out, and substantially enclosed; and on it the Company have built catacombs and vaults, two chapels, one for the service of the Established Church, the other for the use of Dissenters, an entrance lodge, and a dwelling-house now occupied by the secretary to the Company. The total expenditure in the purchase of the land, enclosures, buildings, and other improvements amounted to 65,000*l*.

The Cemetery at Highgate occupies twenty acres of land, which has been laid out in a similar manner to that at Nunhead, and also comprises catacombs, vaults, chapels, a lodge and dwelling. The total expenditure for the land, enclosures, buildings, and improvements amounts to 65,000*l*.

The Nunhead Cemetery was first opened for use in 1843: and the balance or surplus of the revenue, after deducting all the expenses at the Cemetery, but not including any part of the expenses of management of the Company, has been in each year since that time (omitting fractions) as follows.

| | | | | | | | |
|------|---|---|---|---|---|---|------|
| 1843 | - | - | - | - | - | - | £ 75 |
| 1844 | - | - | - | - | - | - | 347 |
| 1845 | - | - | - | - | - | - | 534 |
| 1846 | - | - | - | - | - | - | 462 |
| 1847 | - | - | - | - | - | - | 908 |

But, taking into account the expense of management of the Company, and dividing it equally between the two Cemeteries of Highgate and Nunhead, there was, in the year 1843, on account of the Nunhead Cemetery, a loss of - - - - - £504

*In 1844 a loss of - - - - - 55

In 1845 a profit of - - - - - 76

In 1846 a loss of - - - - - 81

And in 1847 a profit of - - - - - 452

The receipt and expenditure of the Company in respect of each Cemetery, as well as for the general purposes of the Company for the year 1847, were as follows.

The case then set forth the expenditure for each Cemetery, under the heads, respectively, of wages to gatekeeper, watchman, gardener, and

previously to the day on which such annual general meeting is to be held at which such report must be produced, sign their names at the foot thereof in testimony of their approbation of the same: Provided always, That in case the said auditors shall in the exercise of their discretion think it fitting or necessary to make any observations upon any part of the accounts of the said Company produced to them, or shall disapprove of the manner in which such accounts are kept, they shall subjoin such observations and disapprobation to the said report, and shall sign the same."

labourers employed in maintaining the Cemetery and roads; coals, candles, postages, &c.; parochial rates, taxes, &c.; gravel, graveboards, &c.; salaries to chaplain and superintendent; fees to incumbents; commission to undertakers; repair of windows, &c.; and the revenue, by sale of catacombs, vaults, and graves, by common interments, and by interment fees and extra charges, after deducting (a) the expenses in respect of the said catacombs, vaults, graves, and interments: and it stated the following balances.

| <i>Highgate.</i> | | | | | | | | | | | | | | | |
|------------------------------|------|----|----|---|-----------------------------|---|------|----|----|--|--|-----------------------|--|--|--|
| | £ | s. | d. | | | | £ | s. | d. | | | | | | |
| Revenue, after the last-men- | | | | } | Balance, surplus beyond | } | 3245 | 14 | 11 | | | | | | |
| tioned deductions . . . | 4394 | 3 | 9 | | | | | | | | | expenses of the Came- | | | |
| Total expenses . . . | 1148 | 8 | 10 | | | | | | | | | tery | | | |
| <i>Nunhead.</i> | | | | | | | | | | | | | | | |
| Revenue (after deductions as | | | | } | Balance, surplus (as above) | } | 908 | 18 | 2 | | | | | | |
| above) | 1881 | 9 | 0 | | | | | | | | | | | | |
| Total expenses | 972 | 10 | 10 | | | | | | | | | | | | |

*577] The case further stated that the general account of *the Company also contains charges for the following expenses of management.

| <i>Office expenditure.</i> | | | | | | £ | s. | d. |
|--|---|---|---|---|---|------|----|----|
| Salaries, Directors and Auditors . . . | . | . | . | . | . | 210 | 0 | 0 |
| Secretary . . . | . | . | . | . | . | 250 | 0 | 0 |
| Office clerk . . . | . | . | . | . | . | 106 | 1 | 0 |
| Rent of office, Bridge street, Blackfriars . . . | . | . | . | . | . | 100 | 0 | 0 |
| Repairs, painting, &c. . . | . | . | . | . | . | 30 | 0 | 0 |
| Coals, gas, postage, and petty expenses . . . | . | . | . | . | . | 84 | 18 | 5 |
| Advertising . . . | . | . | . | . | . | 31 | 9 | 6 |
| Printing and Stationery . . . | . | . | . | . | . | 87 | 4 | 0 |
| Law charges . . . | . | . | . | . | . | 13 | 1 | 1 |
| | | | | | | £912 | 14 | 0 |

On the hearing of the appeal, the appellants contended that the proper mode of ascertaining the rateable value of the Cemetery was by estimating what a tenant could afford to pay as rent for it, he being obliged to carry on the concern in the same way as the Company are by their acts of parliament compelled to do: and that, in order to arrive at such rent, there should be deducted from the gross revenue of the Nunhead Cemetery (viz., 2536*l.*): 1. The local expenses included in the above account, viz., 1628*l.*, (b) which would leave a balance of 908*l.* 2. Ten per cent. on 2536*l.*, the amount of the gross revenue.

(a) These deductions were: for Highgate, 1372*l.* 13*s.* 9*d.*; for Nunhead, 654*l.* 11*s.* 10*d.*

| | £ | s. | d. |
|---------------------------------|-------|----|----|
| (b) Expenditure . . . | 972 | 10 | 10 |
| Deductions (ante, p. 576) . . . | 654 | 11 | 10 |
| | £1627 | 2 | 8 |

for tenant's profits, viz., 253*l*. 3. One half of 913*l*., the amount of the general expenses of management, including the remuneration to the directors and auditors, as appears in the account above given, viz., 456*l*.: which sums, *being deducted, would leave 199*l*. as the [*578 rateable value of the Nunhead Cemetery.

The respondents contended that the profits derived to the Company were not the sole or proper test of the rateable value of the Cemetery; but the true test was an estimate of the rent at which it might reasonably be expected to let from year to year in the manner prescribed by the Parochial Assessment Act, 6 & 7 W. 4, c. 96. And that a fair and usual mode of ascertaining this rent was by a per centage on the outlay upon the land and improvements, making proper reductions for the repairs and maintenance of the property; an estimate upon which principle would give a much larger sum than that at which the parish have rated the Cemetery. But, if the revenue were to be considered as a proper test of the value, they contended that the Company were not entitled to deduct the general expenses of the management of the Company separate from the expenses of the Cemetery; as the property, for the purpose of the parochial assessment, ought to be considered as in the hands of a tenant at a reasonable rent, unencumbered by the expenses of a large Joint-stock company.

The Sessions held that the revenue derived by the Company from the Cemetery was the proper criterion of its rateable value: That, in ascertaining what a yearly tenant would give for the Cemetery, 10*l*. per cent. on the gross receipts was a proper allowance for the tenant's profits: That a portion of the general expenses of the management of the Company, including the payments to the directors and auditors for their services, should be deducted; and that such proportion of the total amount of the general expenses as the gross *revenue of [*579 the Nunhead Cemetery bore to the gross revenue of the two Cemeteries should be deducted.

| | | | | |
|--|---|-----|-----|------|
| They therefore deducted from the said sum of | - | - | - | £908 |
| 10 <i>l</i> . per cent. on the gross receipts, 2536 <i>l</i> . | - | - | - | £253 |
| And the said proportion of the general expenses, viz. | - | 278 | | |
| | | | 531 | |

| | | | | | | | | | | |
|--|---|---|---|---|---|---|---|---|---|------|
| Leaving as the rateable value of the Nunhead Cemetery, | - | - | - | - | - | - | - | - | - | £377 |
|--|---|---|---|---|---|---|---|---|---|------|

And the Sessions ordered the rate to be amended accordingly, by reducing the sum of 480*l*., on which the Company were therein assessed, to 377*l*.; subject nevertheless to the opinion of this Court.

If the Court should be of opinion that the decision of the Sessions was correct in all the above particulars, then the order of Sessions was to be confirmed, and the rate amended accordingly. But, if the Court should be of opinion that the revenue derived by the Company was not the proper test of the rateable value of the Cemetery, or that, in esti-

rating the rateable value by such test, the Company were not entitled to deduct any portion of the general expenses of the management of the Company, separate from the expenses of the Cemetery, or that, if any deduction should be made on that account, it should not include the allowances to the directors and auditors, then the order of Sessions was to be quashed, and the rate to be confirmed or amended in such manner as the Court of Queen's Bench might think fit to direct.

The case was now argued.(a)

*580] *Gurney, Bodkin, and J. Clerk*, in support of the order of Sessions.—As to the first point raised at Sessions: the criterion of rateable value is, by stat. 6 & 7 W. 4, c. 96, s. 1, the rent at which the property might reasonably be expected to let from year to year. This cannot be estimated from the original outlay. The true question is, what a tenant could give by the year, with a prospect of reasonable profit. This view has been taken, before and since the statute, in leading cases on this subject; as *Rex v. The Trustees of the Duke of Bridgewater*, 9 B. & C. 68 (E. C. L. R. vol. 17), *Rex v. Woking*, 4 A. & E. 40 (E. C. L. R. vol. 31), in which last case the tenant's profit was deemed an essential consideration, and *Regina v. Overseers of Mile End Old Town*, 10 Q. B. 208, 218 (E. C. L. R. vol. 59), where the Court said: "The Company contend that the division should be according to the amount of fixed capital in each district. But the rule of law, laid down by act of parliament, for ascertaining the rateable value of any subject, refers to an estimate of the rent it should yield. The outlay of capital might furnish no such criterion; since it may have been injudiciously expended, and what was costly may have become worthless by subsequent changes." In estimating the rent which a tenant would pay for Waterloo Bridge, the original outlay could not be taken as a test.

Secondly, the general expenses, and among them those of management, might be allowed as a deduction. The judgment of the Sessions is conclusive as to their reasonableness, unless this Court think they ought not to be allowed at all. A proportion of the outlay at the London office must be set against the revenue of *the Nunhead
*581] Cemetery. [*COLERIDGE, J.*—Could that be claimed in the case of a proprietor of large estates, who kept a central office for the management; like the Bedford office in London?] This is not a similar case. Here a place is necessary for the very transactions, the receiving orders and other dealings, by which the profit is made. Expenses of actually conducting the business were considered to be a proper deduction in *Regina v. The Grand Junction Railway Company*, 4 Q. B. 18, 41, 42 (E. C. L. R. vol. 45): and they were allowed by the parish officers, and not afterwards disallowed, in *Regina v. The Great Western Railway Company*, 6 Q. B. 179, 183 (E. C. L. R. vol. 51). [*PATTESON,*

(a) Before PATTESON, COLERIDGE, and WIGHTMAN, Js.

J.—It is very difficult to see how the directors' and auditors' expenses could be part of the tenant's outgoings if the property were let.(a)] The answer is given by the judgment of this Court in *Regina v. The Grand Junction Railway Company*, 4 Q. B. 43: "Though the supposition of a tenancy is to be made, yet what the incidents of the tenancy must be as to actual terms and allowances must be determined, for the purpose of fixing the amount of the rate, by the actual state of things; for this supposition of a tenancy is only a mode of ascertaining the existing value of the occupation to the existing occupier." Directors and auditors are necessary for carrying on this business; and their exertions and influence assist the working and increase the receipts. [PATTESON, J.—If you suppose the property let to a tenant, directors and auditors are out of the question.] The Company's Acts do not contemplate any letting. Regard must be had to the actual situation of *the property under stat. 6 & 7 W. 4, c. cxxxvi. By several [*582 enactments of that statute, the Company must have directors and auditors. [WIGHTMAN, J.—You say that under the statute there can be but one kind of tenancy, and these expenses must be incident to it.] That is so. [PATTESON, J.—There is great difficulty in applying the criterion of value to a tenant in a case like this. Great part of the income arises from sale of catacombs: a tenant could not make profit by selling the land. COLERIDGE, J., referred to *Regina v. St. Mary Abbot's*, Kensington, 12 A. & E. 824(b) (E. C. L. R. vol. 40).] There appears some anomaly in reckoning the produce from sales as part of profits. But this question is not raised in the case. [COLERIDGE, J.—Suppose there were only one Cemetery, the Nunhead, with an office in London; which would be like the case of docks with a counting-house in the city.] If the office were merely for the business of the docks, its expenses would be deducted. If two-thirds of the expenses were attributable to the docks, two-thirds would be deducted.

Bovill and Corner, contra.—First: It has been found convenient in the case of gas pipes, and in other instances where the exact value of the occupation could not easily be ascertained, to take a per centage on the sum laid out in improving the land. The revenue, deducting expenses, would not be a correct test in a case, for instance, where 30,000*l.* had been laid out on sixty acres of ground, but in the particular year there happened to be no profit. The increased value must be considered. A branch railway yielding no profit has been held liable to rate; *Regina v. The Great Western Railway *Company*, 6 Q. B. 179 (E. C. L. R. vol. 51). [PATTESON, J.—According to your argument, if [*583 a person having sixty acres of land were to spend 60,000*l.* upon it in absurdities which produced nothing, he would be rateable in proportion to the outlay.] An approximation must be made. [WIGHTMAN, J.—

(a) See *Regina v. Overseers of Mile End Old Town*, 10 Q. B. 208, 211 (E. C. L. R. vol. 59).

(b) See *Rex v. Atwood*, 6 B. & C. 277, 282 (E. C. L. R. vol. 13).

You need not argue this point so much at large. Both sides agree that there is an annual value; and the difference of estimate is only the excess of 480*l.* over 377*l.*] Although there were no revenue, the property would be rateable to some amount: therefore the outlay upon it must be an element in the calculation. [COLERIDGE, J.—Would a tenant look at all to the original outlay? He must guide himself by the annual revenue.] That is an equally inaccurate test. Convenience is the main reason for adopting either. The question is, which is most convenient.

Then, as to the costs of management. Expenses of direction and management were deducted in *Regina v. The Grand Junction Railway Company*, 4 Q. B. 18 (E. C. L. R. vol. 45),^(a) and *Regina v. The Great Western Railway Company*, but without discussion in either case. On the other hand, no such deduction appears to have been made in favour of *The General Cemetery Company* in *Regina v. St. Mary Abbot's, Kensington*, 12 A. & E. 824, 827 (E. C. L. R. vol. 40). In *Regina v. Overseers of Mile-End Old Town*, 10 Q. B. 208 (E. C. L. R. vol. 59),^(b) the point was not argued. And, on principle, there is no ground for making this allowance. Every expense connected with the Cemetery itself is already deducted. The keeping of an office is an expensive mode of management which the Company *adopt for their convenience. The business of a mine or a colliery may be carried on at an office in London or Newcastle, where the agency is like that of a bailiff managing the estate of an ordinary landed proprietor: but the mine or the colliery is not therefore estimated at a less sum for the purpose of rating. A brickfield is not rated at less because the owner keeps an office. And the offices in question here are not only for managing the Cemetery, but for carrying on the internal affairs of the Company, including transfer of shares, and other matters, which have no connexion with the actual use of the land. Auditors are out of place if the Company be looked upon as tenants occupying at a given rent. The directors do not manage the Cemetery itself; that business is under distinct officers: the directors look after their own interests and those of the Company, and perhaps, by so doing, increase the rateable value of the property, as an individual landholder might: but that is not a ground for diminishing the assessment in either case. Besides, an allowance of ten per cent. on the gross receipts is made in this case for "tenant's profits." Such an allowance is usually conceded even when the landlord himself occupies, on the supposition that the person farming the land is entitled to a remuneration for his personal skill, industry, and intelligence in managing the estate. That remuneration the directors, as members of the Company, receive here: and the Company deduct also a distinct compensation to directors as such. The salaries which they receive are in fact a part of the profits, which the

(a) Page 24, note (a), and p. 31, and note (a) *ibid.*, were referred to.

(b) See p. 211.

Company distribute in this manner among themselves. The rateable value of the land is the same whether the persons receiving salary as directors be many or few. *There is no real difficulty in supposing this property occupied by tenants. Every lay corporation [*585 may lease; 4 Cruise's Dig. 61, tit. 32, *Deed*, c. 5, s. 29; and this power is also incident to the authority vested in The London Cemetery Company by stat. 6 & 7 W. 4, c. cxxxvi. s. 1, "to purchase, hold, and sell lands," &c. As to the sale of catacombs, the Company are not authorized by the act to sell the catacombs themselves, but "the exclusive right of burial" therein; sects. 10, 11.(a) The case, in this respect, is like *Regina v. St. Mary Abbot's, Kensington*. [PATTESON, J.—The Company could not, under the act, let the privilege of granting right of burial in catacombs; but they might covenant to put their seal to their tenant's grants. COLERIDGE, J.—By sect. 91 the directors have the privilege of appointing a clergyman: this could not be granted to a tenant.] *Cur. adv. vult.*

PATTESON, J., in the ensuing vacation (February 26th), delivered the judgment of the Court.

The question in this case was whether the assessment of The London Cemetery Company to the Poor Rate should be reduced from the sum of 480*l.* to 377*l.*, being a difference of 103*l.*

Upon the argument, much discussion took place with respect to many of the items of charge and discharge in the account upon which the assessment was founded; but ultimately the question turned upon the propriety of allowing a deduction on account of the general *expenses of the Company, including payments to the directors and [*586 auditors.

It was contended, for the Company, that certain expenses were necessary to enable them to carry on their affairs as regulated by the Act of parliament, and that without those expenses the same amount of revenue would not be derivable by them from the occupation of the land. The answer, however, which was given, and to which we assent, was, that the expenses in question were quite collateral to the occupation of the land, and in fact had nothing to do with it. They were modes of expending the revenue when derived, but formed no part of the means necessary to acquire it. The payment of salaries to directors, auditors, and secretary is clearly an expenditure of profits derived from the land for the general benefit and purposes of the Company as such. None of the cases cited on the part of the respondents warrant a deduction on account of such expenses; and, as we are of opinion that they ought not to be allowed, there will be judgment for the appellants that the assessment be restored to 480*l.*; the amount of the deduction which we think ought not to be allowed making more than

(a) It is not thought necessary to set out these clauses. The latter gives a form of grant.

the difference between 480*l.* and 377*l.*, the amount to which it was reduced by the order of Sessions.

Rate to be increased accordingly.(a)

(a) See the next case.

*587] *The following case was decided in Hilary term, 1851.

The QUEEN v. The SOUTHAMPTON Dock Company. [Jan. 22, 1851.]

On appeal by the Southampton Dock Company against a poor rate, and case stated for the opinion of this Court, the appellants claimed deductions from the amount at which the rateable value of their property was assessed, as follows. (It is not thought necessary to state the first head).

2. For the expenses of a steam tug, alleged by them to be part of their movable plant, but by the respondents to be independent of the dock establishment. The Company were authorized by their local Act, 6 & 7 W. 4, c. xxix., to build, purchase, or hire steam tugs for the purpose of towing vessels into or out of the docks from or to Southampton Water, &c., or any part of the British Channel, and to pay the expense out of the rates, rents, and sums receivable under the Act. The steam tug was used for the above purpose, and was found by the case to be an useful appendage to the docks and advantageous to those frequenting them, and conducive to the general profit of the concern, though not indispensably necessary, as other steam vessels might have been hired and employed, but with less convenience and advantage.

Held, that the deduction was allowable, the steam tug being ancillary to the dock undertaking.

3. A "personal remuneration" to directors for their trouble, expense, and exercise of skill and judgment in managing the Company's business, independently of interest (5*l.* per cent.) and tenant's profit (20 per cent). The directors, sixteen in number, being proprietors of the Company, were elected periodically under the Act, and were to have the general management and control of the business and concerns of the Company, keep and use the common seal, have the custody of books, deeds, &c., direct investments and sales, and the calling in and laying out of moneys, &c., and all other the dealings of the Company, call meetings, superintend correspondence and the keeping of accounts, ascertain dividends, &c.; and, by a separate clause, they were empowered to direct and employ the works and workmen, regulate the use of the docks and the amount of rates, rents, &c., to be taken, appoint and displace bankers, solicitors, officers, and workmen, &c., and fix their salaries. An allowance had, in former years, been made to the directors for their services, but it had recently been waived by them, on account of the smallness of the Company's dividends.

Held, an allowable deduction.

4. Cranes, steam engines, shears, and other heavy machinery, attached to the freehold and essential to the business, but capable of being detached as easily and with as little injury to the freehold as other fixtures put up for the purposes of the tenant's trade and usually valued as between incoming and outgoing tenant.

Held, not an allowable deduction.

5. The income tax which a tenant would have to pay on his net profits after payment of his rent. Held, not an allowable deduction.

ON appeal by The Southampton Dock Company against a rate for the relief of the poor of the town, &c., of Southampton, pursuant to *588] an act, &c. (13 G. 3, c. 50, "for better regulating the poor, and *repairing the highways within the town and county of the town of Southampton"), made 8th January, 1849, by the guardians of the poor within the said town, &c., pursuant to the said act, and to another act, &c. (Parochial assessment act, 6 & 7 W. 4, c. 96), the Sessions ordered and adjudged:

That the said appellants are not liable to be rated for or in respect of the respective premises which are in the aforesaid rate and assessment respectively described as "West India Company's Manufactory," "Ship Building Yard and Workshops," and "Custom House:" and that the said rate and assessment be amended accordingly, by striking out and expunging such respective premises from the assessment made on the said appellants: and that the rate be further amended by reducing the rateable value of the premises occupied by the said appellants to 3750*l.*, and by reducing the rate on the said appellants in respect of such premises to 156*l.* 5*s.*; subject to the opinion of the Court of Queen's Bench on the case after set forth. And the sessions awarded, &c. (costs to be paid by respondents to appellants). The case was stated as follows.

By a rate, &c. (described as above), the Southampton Dock Company was rated in the entire sum of 4071*l.* net estimated rental or rateable value, in respect of their docks and various buildings, warehouses, stores, workshops, shears, steam engines, water-works, machinery, yards, and buildings belonging to the said Company. The Company appealed against this assessment at the next April Quarter Sessions for the town and county of Southampton, held April, 1849: and the Recorder reduced the amount of the rate to 3750*l.*, with *costs to the appellants, subject to the following case for the opinion of the Court of Queen's Bench. [*589]

The Southampton Dock Company was incorporated by stat. 6 & 7 W. 4, c. xxix.,^(a) amended by stats. 1 & 2 Vict. c. lxii., 6 & 7 Vict. c. lxx., and 8 & 9 Vict. c. xxiii. (all local and personal, public): and, under the provisions and restrictions of these statutes,^(b) the Company proceeded to make the docks and premises included in the rate, and to take toll, &c., and the business of the docks is now carried on under those acts.

In the assessment on the Company, certain parts of the above premises, belonging to the Company, but exclusively used and occupied by other persons, were included; and as to these the Sessions adjudged that the Dock Company was not rateable in respect of them, but only for the docks and other premises occupied by the Company. The following are the particulars of the premises so used and occupied by other persons (that is to say): The Custom House with the appurtenances, leased to and in the occupation of Her Majesty's Commissioners of Customs at the rent of 500*l.* 10*s.*: A manufactory rented and occupied by the West India Mail Packet Company at the rent of 440*l.*: Sundry workshops in the occupation of J. White, at the annual rent of 75*l.* All these premises, except the Custom House, are within the general outer enclosure of the Dock Company's premises. The Custom House

(a) "For making and maintaining a dock or docks at Southampton."

(b) Copies of the several local acts mentioned in the case were to be referred to as part of it.

*590] itself is built on the land taken by the Dock Company under *the powers of one of the above-mentioned acts; but it is without the enclosure; The Customs' Watch House is within the enclosure; and both are let at an entire rent to the Commissioners of Customs. It was proved that the Dock Company had demanded from the West India Mail Packet Company the poor rates due in respect of that portion of the dock premises so occupied by them: and it was contended by the respondents that the Dock Company was rateable for all the above premises; and they referred to the following clauses of stat. 13 G. 3, c. 50.

Section 25, after reciting that "divers houses" "are let out in separate apartments and distinct tenements, and other houses are let ready furnished to lodgers, and divers persons have let tenements, built on ground appurtenant to their principal dwelling, to strangers and others unable to pay" rates, or improper to be rated, "whereby the payment of the said rates," &c., "may by some of them be evaded," &c., provides "that every person, whether landlord or tenant, who shall let out his or her house in separate apartments, or ready furnished to a lodger or lodgers, or have or let any such buildings as aforesaid, shall, for the several purposes of this act, be deemed and taken to be the occupier thereof; and such landlord or landlords, tenant or tenants, or any or either of them, at the discretion of the said guardians, may be rated or assessed accordingly, and shall be liable and subject to the payment of the sum so rated or assessed." And, by the 26th section of the same act, the goods and chattels of every person renting or occupying any such separate apartment in such house, or renting or occupying any such ready furnished or any such tenements, are liable to be distrained for payment *of the said rate; and the amount so paid *591] or levied may be deducted out of the next rent due to the landlord.

As to the residue of the property, in the occupation of the appellants: their revenues are derived under the provisions of their acts from tonnage dues, rates on exports and imports, warehouse and wharfage rents, payments for using graving or dry docks, and tolls paid by passengers landing or embarking at the docks. All these payments accrue either in respect of the use of the Company's premises, or for work done by the Company's servants and workmen for those who use them. The premises and business carried on in them are of such a nature that it cannot reasonably be expected that any prudent person would become a mere yearly tenant of them.

Both parties agreed as to the principle of rating: that is to say, that the net annual receipts of the Company should be taken without allowing interest on the original outlay in forming the docks, or on subsequent loans for the enlargement or completion of them: and, after deducting therefrom interest on the capital necessary for carrying on

the business of the Company, tenant's profits, taxes, and the estimated annual expenses of repairs and renovations, that the residue was the rateable value.

The difference between the parties arose on some of the items of disbursement and deduction claimed by the appellants. The following is a short statement of receipts and deductions as allowed by the Court :

| | |
|--|----------------|
| The gross receipts for the year, exclusive of the rent of the premises rateable separately | £ 20,600 |
| *592] Disbursements during the same year, including *expenses of a Steam tug, Direction, Insurance, Local rates, &c. | 10,300 |
| Net receipts | <u>£10,300</u> |

Further deductions claimed and allowed were :

| | |
|--|----------------|
| Capital necessary for carrying on the Company's business ;—that is to say, Movable Plant | £6,900 |
| Coals in store, Materials, and Cash balance | 8,100 |
| Total amount Capital | <u>£15,000</u> |

| | |
|--|---------------|
| On which last amount the Court allowed (under the special circumstances of the case) 5 per cent. interest, and 20 per cent. for tenant's and trade profits | £ 3,750 |
| Estimated annual expense of repair and renovation of movable plant | 845 |
| Estimated annual repair and renovation of fixtures or fixed plant described hereafter | 890 |
| Annual repair and maintenance of the freehold premises occupied by the Company, exclusive of the above fixtures | 1,565 |
| Total deductions | <u>£6,550</u> |

Net rateable value in the hands of a tenant - - £3,750

To which last amount the rate was reduced by the Court.

The respondents objected to any deduction for disbursements in respect of the items of Steam tug and Direction.

*As to the steam tug, for the expenses of which the Court allowed 778*l.*, it appeared that one had been and was actually in use by the Dock Company for the purposes of the docks ; and the Company are empowered by the 188th section of the Dock Act (a) to build

(a) Stat. 6 & 7 W. 4, c. xxix, s. 188, enacts: " That it shall be lawful for the said Company and they are hereby authorized to build, purchase, or hire any steam tugs or steamboats for the purpose of towing any vessels or ships into or out of the said dock or docks from or to South-

or provide out of the income of the Company steam tugs for the purpose of towing any vessels into or out of the docks from or to Southampton or any part of the British Channel. The steam tug offers considerable advantages to those who use the docks, and may be fairly considered as an useful appendage to them, and conducive to the general profits of the concern. It was not indispensably necessary, inasmuch as the duty might have been done by hiring other steamboats at Southampton for each occasion, but at less advantage and convenience both to the Company and the public using the docks. The value of such a tug is to be taken at 2500*l.*, and is included in the estimated value of the movable plant hereinbefore mentioned. The actual receipts or earnings of it for the year are included in the above statement of the general receipts of the Company, and amounted to 616*l.*

*594] As to direction.(a) This was a sum of 1000*l.* *heretofore paid to the directors, under the Dock Act, as personal remuneration

ampten Water or the River Itchen, or any part of the British Channel, and to defray the expenses of building, purchasing, hiring, repairing, maintaining, and working the same out of the rates, rents, and sums hereby authorized to be received and taken.

(a) Stat. 6 & 7 W. 4, c. xxix., s. 67, enacts: "That the business and concerns of the said Company shall" (after their first general meeting) "be carried on under the management of sixteen directors, to be chosen from time to time from amongst the proprietors for the time being of the said Company, qualified by holding fifteen shares or upwards each, together with the director (if any) to be nominated by the Council of the borough of Southampton, as hereinbefore provided; and such directors shall have the general management, direction, and superintendence and control of the business and concerns of the said Company, and the custody of the common seal of the said Company, with power to use the same on their behalf, and also the custody of the books of account, and other books, deeds, and papers, and shall have power to direct the investment, calling in, and laying out, sale and disposal, of the stocks, effects, funds, moneys, and securities of the Company, and all other the dealings of the Company, and to call and appoint the times and places of holding general and other meetings of the proprietors, and to superintend, direct, and control the correspondence and mode of keeping the accounts, and the ascertainment of dividends and the profits or shares, and to do all other things necessary or deemed by them proper or expedient for carrying on the business and concerns of the Company, and to enforce, perform, and execute all the powers, authorities, privileges, acts, and things in relation to the said Company, and to bind the said Company as if the same were done by the whole Corporation, except such as are hereby required to be done at some general or special meeting of the said Company; and that the directors for the time being shall have power to frame rules and regulations and prescribe the orders and directions for carrying on the business and concerns of the said Company, and alter and vary the same from time to time as they in their discretion shall think fit; and all such rules and regulations shall have the force of by-laws, provided the same be not repugnant" to this Act, &c.; "and that no individual proprietor not being a director, except as hereinbefore provided, shall have a right to any interference, management, direction, or control in or over the business and concerns of the said Company, or the capital stock or effects thereof."

By other sections the powers and duties are specified more in detail; and

Seet. 78 enacts: "That the said directors shall have full power and authority to direct and employ the works and workmen, and regulate the use of the said dock or docks, and the amount of the rates, rents, and sums of money to be taken and received under the authority of this Act, and also from time to time to appoint and displace the banker or bankers, and the solicitor or solicitors of the said Company, and also to appoint the secretary of the said Company, and all such managers, officers, agents, clerks, collectors, workmen, and servants as the said directors shall think proper, and to allow to them respectively, and also to any director or directors authorised by any general meeting to hold any office, place, or employment under the Company as aforesaid, such salaries, gratuities, and recompenses as to the said directors shall seem proper, and shall have power from time to time to delegate to them respectively, by any instrument in writing or otherwise, such powers and authorities as the said directors may deem expedient, and

for managing the business of the Company. The dividends of the Company being small, *the directors had in fact waived and declined to receive any remuneration for the last year before the assessment. [595 The item was allowed by the Sessions as a reasonable remuneration for the personal trouble and expense, and for the exercise of the skill and judgment, of a supposed lessee of the Company in managing the affairs of the docks, independently of the profit on capital embarked by him.

In addition to the deductions allowed by the Court, the appellants claimed two further reductions. They contended that certain fixtures or fixed plant, consisting of cranes, steam engines, shears, derricks, dolphins, and other like ponderous machinery, attached to the freehold and essential to the business of the Company, should be taken into account in estimating the rent, as fixtures for which a tenant would be required to pay on taking possession of the premises demised, and ought to be treated as personal stock in the nature of stock in trade, and part of the capital which a tenant would have to invest in the business: that, if so considered, such fixtures would diminish instead of increasing the *rateable value of the property of the Company. [596 The fair value of the fixtures, if purchased by an incoming tenant, would be 6450*l.*: and the Sessions find as a fact that the fixtures in question were attached to the freehold, but are capable of being detached from the freehold as easily and with as little injury to it as other fixtures put up for the purposes of the trade or business of the tenant, and usually valued as between incoming and outgoing tenant. If these fixtures ought to be regarded as stock in trade or personal stock, then the appellants are entitled to the same deduction in respect of interest and tenant's profits as on the sum of 15,000*l.* above mentioned.

The appellants further claimed to deduct 155*l.* per annum for income tax; and they claimed this reduction, not in respect of the amount of tax actually paid by them as owners of the premises, but in respect of the estimated profit or income of the supposed tenant of the Dock Company; contending that the tax would operate to diminish the rent which the tenant would agree to pay. The Sessions held that the tax, being on the net income of the lessee over and above the rent paid for the premises by which his profits are earned, could not affect the rent; and disallowed the deduction. The respondents did not object to the amount

to vary, alter, and revoke such powers and authorities, and to grant and delegate others, whenever and so often as the said directors may think proper, and shall have power to displace or remove any secretary, managers, officers, agents, clerks, workmen, and servants, either as occasion shall require or as the said directors in their discretion shall think fit, and also from time to time, if deemed expedient, to appoint other persons to fill vacancies in their places and situations respectively, occasioned by such displacement or removal as aforesaid, or by death, resignation, or otherwise: Provided nevertheless, that it shall not be lawful for the said directors to fix or order what remuneration shall be allowed to the directors of the said Company for their services as directors."

of this deduction, if allowed at all; and no point was raised on the effect of the payment of the tax by the Company under Schedule (A) of the Income Tax.(a)

The points in difference between the parties, submitted to the judgment of this Court, are therefore as follows.

On the part of the respondents:

*597] *1. That the Dock Company was properly assessed for the premises hereinbefore described as occupied by other parties.

2. That the expenses of the steam tug ought not to have been allowed.

3. That the deduction under the name of Direction ought not to have been allowed.

On the part of the appellants:

1. That the fixtures or fixed plant of the company as above described ought to have been considered as capital or stock in trade.

2. That the Income Tax on the tenant's income or profit ought to have been deducted.

The rate, as amended by the Sessions, is to be raised or further reduced, amended, confirmed, or referred back to the Sessions, as this Court shall think fit.

The case was argued in last Michaelmas term,(b) on a rule calling upon the prosecutors (respondents) to show cause why the order of Sessions should not be quashed, and the rate further amended by increasing or further reducing the rateable value of the premises occupied by the appellants, and the rate in respect thereof, to such sum or sums as the Court should think fit.

M. D. Hill and *Massey* showed cause.(c)—First: they admitted, as to the premises occupied by persons, other than the Company, that the *598] Custom House, being *in the occupation, virtually, of Her Majesty, could hardly be considered as coming within stat. 13 G. 3, c. 50, s. 25. As to the other premises, they left the case to the decision of the Court without further argument; and, when counsel on the other side were heard, it was considered as abandoned.

Secondly: the Recorder was wrong in treating the steam tug as part of the Company's floating capital. The use of it is merely collateral to the dock establishment. The question is just the same as if the docks and steam tug were the property of a private individual. Such a person, holding the docks, might at the same time carry on twenty different trades; the use of a particular apparatus in these would not, by any consequent loss, affect the rating of the docks. The case

(a) 5 & 6 Vict. c. 35, s. 1, and schedule (A).

(b) November 16th, 1850. Before Lord CAMPBELL, C. J., COLERIDGE, WIGHTMAN, and ERLE, Js.

(c) A question was made which party ought to be first heard: and the Court ruled that, as, by the form of this rule, the respondents were called upon to show cause, the counsel representing them should begin, though they did not support the order of Sessions.

expressly finds that this vessel is not essential to the business of the docks, though it is highly convenient. It might make the use of them more profitable; but so might a road, or any facility to the resort of carriers. [Lord CAMPBELL, C. J.—Suppose the case of a steam tug¹ employed on a canal.] There the canal itself, the land rated, is used by means of the steam navigation. If, indeed, the Company took a higher rate of toll at the docks in consideration of carrying by the steam tug, the case might be different; but here the “earnings” of the vessel are evidently a distinct matter. [Lord CAMPBELL, C. J.—It is found to be an “useful appendage” to the docks.] That does not alter the real view of the case: the vessel may be sent to the mouth of the British Channel. The question is, whether or not it forms part of the dock concern. Suppose the Company employed men to haul: could they, on appeal against a rate, deduct an amount by which *the [*599 payment of such men might exceed the earnings they brought in? An analogous question arose in *Regina v. The Great Western Railway Company*, 6 Q. B. 179 (E. C. L. R. vol. 51), where the Court refused to allow deductions in respect of branch railways, unprofitable in themselves, and serving merely to augment the traffic on the main line; and it was asked in argument (p. 194): “If the owner of a pleasure garden, to which persons were admitted for money, kept a boat to bring persons across a river to the garden, could he claim a deduction from the rate upon his garden for the expenses of the boat?” [Lord CAMPBELL, C. J.—Does the Court adopt that illustration?] Another is given in the judgment (p. 206): “If the lessee of a coal mine were to open roads through adjoining lands rented under a separate demise, in order to facilitate the access of customers to the mine and so increase its profits, the expense of such roads would certainly not be an outgoing to be allowed for by the overseers.” [Lord CAMPBELL, C. J.—The road does not come into the mine, as the steam tug does into the docks.] It comes to the pit’s mouth. [Lord CAMPBELL, C. J.—The surface is not rated. Suppose a crane were erected at the docks, and separate charges made for the use of it.] It would be an annexation to the realty, and rateable with the docks on the principle of *Rex v. St. Nicholas, Gloucester, Cald.* 262. The steam tug is independent of the docks. Others than the Company might work it for the same purpose. [ERLE, J.—Do you allow any kind of movable plant to be a fair subject of deduction?] A carriage on the small railways from the dock side to the warehouses might be so, because the docks could not be worked *without it. [ERLE, J.—Suppose instead of a tug [*600 there were a hawser, and the docks were so constructed that a ship could not readily enter them but by help of it; the ship would have a right to expect that accommodation; and would not the implement be a part of the docks for the purpose of assessment?] It would locally belong to the premises, and so might be brought into the assess-

ment. Questions of this kind may depend on the circumstances of each case; the difficulties which arise press upon those who introduce "movable plant" as a subject of estimate. The use of steam tugs is not, regularly, a part of the dock business. The docks remaining the same, ten tugs might be required instead of one, if many ships were arriving at the same time. [Lord CAMPBELL, C. J.—The rateable value would increase in proportion.] Sect. 188 enables the Company to build, purchase, or hire, and to work, steam tugs, and to defray the expenses "out of the rates, rents, and sums hereby authorized to be received and taken." That must be out of the profits, after the deductions contemplated by the Parochial Assessment Act, 6 & 7 W. 4, c. 96, s. 1, have all been made. [ERLE, J.—The section does not say "out of the profits." The words imply no more than a payment out of receipts. Lord CAMPBELL, C. J.—It is meant that the whole should be productive as one concern.]

Thirdly: The allowance to directors is unwarranted. It is not reasonable that a member of the Company should receive twenty per cent. for tenant's profits (in addition to interest), and also a recompense for direction. A tenant in the ordinary sense would carry on his affairs without such help. [Lord CAMPBELL, C. J.—If he did hire persons to *601] do the duties of clerks, which *these directors perform, would not he be entitled to a deduction, as for the pay of other labourers?] The business they do is that for which the tenant claims his twenty per cent. [Lord CAMPBELL, C. J.—If he would be obliged to hire persons to do what is done by these directors, it would be a deduction.] The directors do not perform the office of clerks; they are the managers and rulers of the concern. On this part of the case *Regina v. St. Giles, Camberwell*, ante, p. 571, is in point.

Fourthly: The appellants are not entitled to the deduction in respect of fixtures. These are not found by the case to be tenant's fixtures. They are at all events something which the tenant has annexed to the rateable property, and which makes it more valuable and fit to command a higher rent. The rate ought not to be lowered in respect of these, but raised in proportion to the improved value; *Rex v. Lord Granville*, 9 B. & C. 188 (E. C. L. R. vol. 17), *Rex v. The Birmingham and Staffordshire Gas Light Company*, 6 A. & E. 634 (E. C. L. R. vol. 33), *Regina v. Guest*, 7 A. & E. 951 (E. C. L. R. vol. 34), *Regina v. The London and South Western Railway Company*, 1 Q. B. 558, 581 (E. C. L. R. vol. 41). The rails on a railway are removable; but while annexed to it they contribute to the rateable value.

Fifthly: the claim in respect of income tax is grounded, not upon any liability of the Company as owners, but upon the supposition of a tenancy, and the assumption that a tenant would give less rent for the property on account of his being liable to income tax. The argument rests entirely on a passage of the judgment in *Regina v. The Great*

Western Railway *Company, 6 Q. B. 179, 205 (E. C. L. R. vol. 51). The Court there expressed itself doubtfully; and whether [*602 or not the payment of income tax had been made under circumstances applicable to the supposed tenancy in the present case, does not appear. It is an error to say generally that the income tax would operate in diminution of the rents: the tax comes out of each man's clear profits, after deduction of rent as well as the other necessary parts of his expenditure. To hold that it should make rent less would be throwing the tenant's income tax upon the landlord.

If these arguments prevail, the Court will disallow all the deductions claimed, and restore the rate to its original amount.

Greenwood, Saunders, and Wise, contra.—As to the second point: the Company is empowered by statute to create a property for the purposes of a dock, and, by the same Act, to provide steam tugs for the furtherance of those purposes; the expense to be defrayed out of the receipts of the dock: at least no other fund is assigned. It may, therefore, be assumed that the work by steam is not contemplated as a distinct trade: and this is the more clear as the expenses of it have exceeded 700*l.* in a year, while the receipts have been only 616*l.*, which shows that the work is profitable only as subservient to the purposes of the dock. The steam tug is, in fact, like the horses and wagons kept upon a farm, which do work there, and assist also in carrying the produce to market; but all that they do is contributory to the object of making up the rent. The case of the branch railways, alluded to on the other *side, is not analogous: they are themselves a subject of rate [*603 where they lie, and not, like the steam vessel, removable to the place where the assessment is laid. These tugs, though detached from the shore, are not, practically, different from the long ropes by which carriages are drawn from a distance on the Blackwall and other railways. It is true that a ship is not obliged to use them, but may wait for the two or three winds which would carry her into this dock; but, in like manner, a ship may refuse other facilities offered by the dock, which nevertheless are considered in an assessment as part of the apparatus, and come within the observation of Lord DENMAN, C. J., in *Regina v. The Great Western Railway Company*, 6 Q. B. 201 (E. C. L. R. vol. 51), that the value of the occupation must be sought (in the case of a railway), “not by drily considering what rent would be given for so many miles of railway as happened to be in the rating parish, apart from all the actually co-existing circumstances; but by including in the consideration all such as would necessarily attend upon the occupation under the demise, and influence the tenant's mind as to the amount of rent which he would give.” *Rex v. The Hull Dock Company*, 3 B. & C. 516, 528 (E. C. L. R. vol. 10), is an authority on this as well as on other points of the present case.

Thirdly: as to the Direction. But for the decision in *Regina v. St.*

Giles, Camberwell, the case on this point is plain. The directors, under stat. 6 & 7 W. 4, c. xxix., sects. 67—78, have more various powers than were given in that case. The functions are, at all events, beyond the scope of an ordinary lessee. *Supposing it possible that this *604] property could be tenanted, the lessee could only give a general attention to the management of the affairs, and see that proper persons were engaged to do the special duties which are here intrusted to the directors. The directors do not fill the place analogous to that of a tenant: the whole Company are the tenants. [COLERIDGE, J.—Is it anything more than a certain number of the occupiers managing for themselves and the rest? And is not that trouble repaid out of the twenty per cent.?] Supposing the number of proprietors very large; eight thousand for instance; they must either hire persons not proprietors, at so much a year (if their Act would allow this), to do the particular duties, or employ so many of their body for that purpose, at a like remuneration, which is the same thing, in a pecuniary view, as if they called in strangers. [Lord CAMPBELL, C. J.—The argument is that any personal trouble of this kind taken by proprietors is recompensed by the twenty per cent.] This is a particular property, existing only by the local act; and the peculiar state of things under it must be looked to. The directors have to do every duty of management except fixing their own remuneration. The Recorder conceded the allowance, under the circumstances of the case, as a reasonable remuneration for “personal trouble and expense,” and “exercise” of “skill and judgment,” “independently of the profit on capital embarked.” It often happens in partnerships that a partner has an increased share of profits for his personal exertion. Here the same increase is given on the twenty per cent. In *Rex v. The Oxford Canal Company*, 10 B. & C. 163, 176 (E. C. L. R. vol. 21), it was expressly *605] held *that, on the calculation of profit, “the expense of collecting the tolls” must be allowed to the tenant. It did not appear in *Regina v. St. Giles, Camberwell*, that the directors did anything towards the actual earning of profits on the estate assessed. That was the case of a joint-stock company for carrying on business in two different places: it required a general management and superintendence not limited to one or the other cemetery. [Lord CAMPBELL, C. J.—I believe that was considered in the judgment of the Court.] Here the direction is for purposes confined to the parish where the rate is laid.(a)

Fourthly: as to the fixtures, it is difficult to contend with the cases referred to on the other side; but the decisions have not been perfectly uniform, and have turned on circumstances very much differing in the respective cases. *Rex v. The Birmingham and Staffordshire Gas Light*

(a) *Wise* referred here to *Regina v. Overseers of Mile End Old Town*, 10 Q. B. 208 (E. C. L. R. vol. 59).

Company, 6 A. & E. 634(a) (E. C. L. R. vol. 33), appears to be grounded on the opinion formed by the Court during the argument in *Regina v. Guest*, 7 A. & E. 951 (E. C. L. R. vol. 34). It is unreasonable that, in a parish where personal property is not rated, chattels brought upon the land by the tenant and removable by him should increase the rate upon such land. Upon this principle, a person who has taken a house with expensive fittings, paying for these at his entrance, must be rated from year to year at an amount much higher than his rent, the price of the fittings being taken as so much rent prepaid. In many of the earlier cases on this subject it does not appear whether or not [*606 *personal property was rated in the parish. [Lord CAMPBELL, C. J.—The question of rating personal property was never suggested in these cases.] Fixtures which do not go to the landlord when the tenant removes ought not to be considered in the assessment. [Lord CAMPBELL, C. J.—Their being removable is often matter of contract. You would introduce a new boundary which would raise as many subtleties as the existing rule.] Fixtures of this kind may be considered as part of the “other expenses, if any, necessary to maintain” the premises “in a state to command such rent,” according to stat. 6 & 7 W. 4, c. 96, s. 1.

Lastly: as to the income tax, the judgment of this Court in *Regina v. The Great Western Railway Company*, 6 Q. B. 179 (E. C. L. R. vol. 51), is in point. [Lord CAMPBELL, C. J.—The tax is not a deduction, but a general charge upon the Queen's subjects who have 150*l.* a year.(b)] It is an outgoing not distinguishable in principle from the poor rate, which has been allowed as a deduction; *Rex v. The Hull Dock Company*, 3 B. & C. 516 (E. C. L. R. vol. 10), *Rex v. The Oxford Canal Company*, 10 B. & C. 163, 173, 176 (E. C. L. R. vol. 21). A tenant, in estimating the rent he could afford to pay, would consider the income tax upon profits: and it would make no difference to him whether the sum was payable to a parochial or a government collector.

Cur. adv. vult.

Lord CAMPBELL, C. J., in Hilary term (January 22d), 1851, delivered the judgment of the Court.

1. The first question which arose in this case was, *whether [*607 the appellants were liable to be rated to the relief of the poor in respect of certain premises of which they are the owners but not the occupiers; viz., The Custom House, in the occupation of Her Majesty's Commissioners of Customs, at the rent of 500*l.* 10*s.* a year; a manufactory in the occupation of The West India Mail Packet Company at the rate of 440*l.* a year; and several workshops in the occupation of J. White at the rent of 75*l.* a year. The liability of the appellants to be rated for these premises was rested on a local act of parliament, 13

(a) See p. 644, note (a).

(b) See *Rex v. Adames*, 4 B. & Ad. 61, 68, 9 (E. C. L. R. vol. 24).

G. 3, c. 50, for regulating the poor in Southampton; which, to remedy the inconvenience produced by persons letting small tenements to strangers and others unable to pay rates, enacts that every person who shall let out his house in separate apartments or ready furnished to lodgers, or shall so let tenements built on ground appurtenant to his principal dwelling, shall, for the purposes of the act, be deemed the occupier thereof. We are clearly of opinion that this enactment does not apply to any of these premises, although they be all within the general outer enclosure of the Dock Company except the Custom House, which is built on land of the Company at a considerable distance. Indeed the point was not seriously pressed by the counsel for the respondents; and there is no necessity for saying more upon it.

2. But they strenuously objected to the deduction of 778*l.* from the sum on which the assessment was to be made, for the expenses of the steam tug, contending that the steam tug was entirely unconnected with, or at least collateral to, the trade of keeping the docks; that the Company carried on two trades; and that the loss upon the trade *608] of steam tug keepers, which was *unconnected with the property liable to be assessed, could not be allowed as a deduction from the profits of the docks. But the case finds that the Company, being empowered by their act of parliament to provide out of their income steam tugs for the purpose of towing any vessels into or out of the docks from or to Southampton or any part of the British Channel, did employ for this purpose the steam tug in question, which "offers considerable advantages to those who use the docks, and may be fairly considered as an useful appendage to" the docks, "and conducive to the general profits of the concern," although "it was not indispensably necessary, inasmuch as the duty might have been done by hiring other steamboats at Southampton for each occasion, but at less advantage and convenience both to the Company and the public using the docks." We think that, upon this statement, the steam tug must be taken to be ancillary to the docks, and part of the floating capital used in carrying on this concern. She was sometimes employed beyond the limits of the docks; but this was only with a view to the traffic carried on in unloading and loading cargoes within the docks. It was admitted that, if ropes fixed to a block in the docks had been run out far beyond the limits of the docks, and, being there fastened to ships about to enter, had been used to draw them to the wharf where they were to unload, the expense of these ropes would be a fair deduction from the profits of the concern in estimating the amount of the assessment; and the expense of the steam tug seems to us to rest upon the same principle. The account is credited with the 616*l.* earned by her; and her receipts might have exceeded her expenses, thereby augmenting the sum to be assessed.

*3. We entertained considerable doubt, during the argument, respecting the 1000*l.* under the head of *Direction*, stated to be [*609
 “a reasonable remuneration for the personal trouble and expense, and for the exercise of the skill and judgment, of a supposed lessee of the Company in managing the affairs of the docks, independently of the profit on capital embarked by him.” We were startled by such an allowance for what might be supposed to be done by the lessee personally, in addition to 5*l.* per cent. interest on capital, and 20*l.* per cent. for tenant's and trade profits, although the Directors of the Company had declined to receive any remuneration for the last year before the assessment. But we have only to consider whether, in point of law, there ought to be an allowance in a concern of this sort for management, as well as a per centage for interest on capital, and tenant's profits. The reasonable amount of these must be deemed matter of fact, which the Sessions have determined: and the question for us is the same as if the sum put down for management had been 50*l.* after an allowance of 8*l.* per cent. on capital, and 7*l.* per cent. for tenant's profits. Now, looking to the nature of this concern, and the allowance previously received by the directors, and to which they were still entitled, we cannot say that there ought not to have been an allowance for management, which might be stated as a reasonable remuneration to the lessee of the Company in the terms used by the learned Recorder. The case of *Regina v. St. Giles, Camberwell*, antè, p. 571, was strongly relied upon by the respondents: but there two concerns had been conjoined, one of which only was the *subject of the rate; and an allowance was claimed in respect of a payment made to the [*610
 Directors for managing both.

4. The fourth question arose upon a deduction claimed by the appellants, which was disallowed. They contended that their cranes, steam engines, and other like ponderous machinery, although attached to the freehold, ought to be treated as stock in trade and part of the capital which a tenant would have to invest in the business, so as to diminish instead of increasing the rateable value of the property of the Company. The Sessions did find as a fact that these fixtures, worth 6450*l.* to an incoming tenant, although attached to the freehold, are capable of being detached from the freehold as easily and with as little injury to it as other fixtures put up for the purposes of the trade of the tenant and usually valued as between incoming and outgoing tenant. But this is a rate upon buildings to which machinery is attached for the purposes of trade; and it has been solemnly decided that such real property ought to be assessed according to its existing value as combined with the machinery, without considering whether the machinery be real or personal property, or whether it be liable or not to distress or seizure under a fieri facias, or whether it would go to the heir or executor, or, at the expiration of a lease, to the landlord or tenant; *Rex v. The Bir-*

mingham and Staffordshire Gas Light Company, 6 A. & E. 634 (E. C. L. R. vol. 33); *Regina v. Guest*, 7 A. & E. 951 (E. C. L. R. vol. 34). In this last case all the arguments pressed upon us to show that such fixtures are stock in trade and not to be taken into account in a rate *611] on the realty were urged, *but urged in vain. It is of the greatest importance that a rule upon such a subject, which has been laid down and acted upon, should be adhered to: and we see no reason why this rule should be now disturbed.

5. On the last point no reasonable doubt can be entertained; the appellants claiming a deduction of 155*l.* for income tax in respect of the estimated profit of the tenant to whom the docks might be let. This is not a tax upon the subject-matter rated, which the tenant as such would be obliged to pay, but upon the net income of the tenant after paying the rent of the premises by which his profits are earned. The cases cited apply to local taxes which affect the subject-matter rated and operate directly in diminution of the rent.

For these reasons we are of opinion that the learned Recorder of Southampton rightly disposed of all the questions brought before him, and that the order of Sessions should be affirmed.

Order of Sessions affirmed.(a)

(a) See *Regina v. Leith*, 1 E. & B. 121 (E. C. L. R. vol. 72); *Regina v. Morrison*, 1 E. & B. 150. For a decision as to costs, in the case reported in the text, see 12th May, 1851, post.

The QUEEN v. The Inhabitants of BASINGSTOKE. Jan. 19.

Examinations before two justices removing a pauper from parish B. to parish W. showed that the pauper was a bastard born, before 1834, in a third parish, C.; that his mother was at the time of his birth settled in W.; that before her confinement the overseers of C. told her that she should not stay there unless a certificate from parish W. was obtained; that after this the overseer of W. took her to affiliate the child, and gave her relief whilst she remained in C.; and that parish W., for six years, supported the pauper in C. after the mother had left C. On appeal against the order of removal, the Sessions stopped the case, on the ground that the examinations disclosed a *prima facie* birth settlement in C., and that no certificate from W. to C. was produced, nor any evidence given that such certificate was lost.

Held, that the conduct of the overseers of W. was evidence of an admission by that parish that there existed such a certificate as was required to settle the pauper in W.: for that an admission of the effect of a written instrument by a party to a cause supersedes the necessity of producing or accounting for such instrument, equally whether the admission be made in words, or to be inferred from acts.

ON appeal against an order of two justices for removing Stephen Oliver, and his wife and child, from the parish of Basingstoke, in Hampshire, to the parish of *Wootton St. Lawrence, in the same *612] county, the Sessions (28th June, 1848) quashed the order, subject to the opinion of this Court on the following case. The examinations, so far as they are material, were as follows:

Harriet Sheppard said: "My maiden name was Harriet Oliver. The

said Stephen Oliver, now present, and last examined, is my son, and was born a bastard, in the parish of Church Oakley, in the county of Southampton, thirty years ago come next October. In or about the year 1815, about a month before Old Michaelmas day, being then an unmarried person, not having child or children, I was hired by Mr. W. Budd, of the parish of Wootton St. Lawrence, in the said county of Southampton, farmer, to serve him for a year from the then next following Old Michaelmas day; and under such yearly hiring I served my said master for one whole year from the last-mentioned Old Michaelmas day, until the then next following Old Michaelmas day. I resided during the whole of the said service in the said parish of Wootton St. L.: and from the time of my said hiring until the end of my said service I continued an unmarried person, not having child or children. About two years after my said service I became pregnant with the said Stephen Oliver, and went to reside with my mother, Ann Oliver, now present, in the said parish of Church Oakley; but, shortly before my confinement, the overseers of Church Oakley aforesaid came to me, and said I should not stay in their parish to be confined, and that they would have me removed to the parish of Wootton St. L. directly, unless the overseers of that parish granted a certificate to hold the said parish of Church Oakley harmless in respect of myself and my child. [*613 A *certificate, as I believe, was then granted by the said parish of Wootton St. L. I was often told, and I always understood, that such certificate was granted. I continued to reside with my mother in the said parish of Church Oakley: and my said child was born there, as before mentioned. About two months after the birth of my said child, I went abroad, and left it in the care of my said mother. When it was born I received 2*l.* from Mr. W. Budd, one of the parish officers of Wootton St. L. aforesaid, as relief for myself and child: this sum was paid for us to my said mother. Before my said confinement I was taken to Malstranger by the said W. Budd, and sworn as to the father of my said child."

The examination of Ann Oliver was as follows: "I am the mother of the said Harriet Sheppard last examined. At the time of her confinement, as mentioned by her, she was residing with me in Church Oakley aforesaid; and I well remember that shortly before her confinement the parish officers of Church Oakley aforesaid interfered and refused to let her stay with me, or in their parish, unless she and her child were certified from the said parish of Wootton St. L. I believe such certificate was granted, as she was allowed afterwards to stay with me. When my said daughter was brought to bed I received 40*s.*, as relief for herself and her child, from Mr. Budd, the overseer of Wootton St. L. aforesaid; and from the time of the birth of her said child, for six years and upwards, I received from the parish officers of Wootton St. L. aforesaid, for the said child whilst he was residing, to the knowledge

of the said parish of Wootton St. L., in the parish of Church Oakley aforesaid, regular weekly *relief in money, namely, the sum of *614] 1s. 6d. per week, for his maintenance and bringing up."

The grounds of appeal relied upon were:

2. That the said order and examinations do not show that any certificate of acknowledgment, according to the statute in that case, &c., that the said H. Sheppard, the mother, and the said Stephen Oliver, were settled in our said parish of Wootton St. L., and that she was pregnant with child of the said bastard Stephen Oliver, or that any legal and sufficient evidence of the said supposed certificate, was produced before the justices when the said order of removal was made, or at any other time. 4. That the said Stephen Oliver, his said wife Martha, and his said child Mary, are not, nor is either of them, legally settled in our said parish of Wootton St. L. by birth, or by certificate of acknowledgment, or by relief, or in any other way. 5. That it appears on the face of the said examinations, and is true, that the said Stephen Oliver was born a bastard before the 14th of August, 1834, in the parish of Church Oakley, in the said county of Southampton. 6. That the evidence of relief alleged to have been given by our said parish of Wootton St. L. to the said Harriet Sheppard and the said Ann Oliver, for and on account of the said Harriet Sheppard and the said Stephen Oliver respectively, while residing in the said parish of Church Oakley, was improperly received and acted upon by the said removing justices, inasmuch as the said evidence was repugnant to the proof of settlement by birth of the said Stephen Oliver in the said parish of Church Oakley, as offered to and received by the said removing justices.

*615] At the trial of the appeal, the counsel for the *respondents, on opening his case, was met with a preliminary objection, that the order must be quashed for the defects in the examinations pointed out in the above stated grounds of appeal. After argument, the Sessions stopped the case, and held that the examinations were insufficient on the ground contended for on behalf of the appellants: namely, that, as the examinations showed a settlement by birth in a third parish, that was conclusive of the settlement of the pauper in that parish: and no evidence having been given before the removing justices of a certificate from Wootton St. L., by the production of such certificate, nor any proof of search having been made for the same, the evidence of relief was improperly received by them. And the Sessions therefore quashed the order of removal.

If the Court should be of opinion that the Sessions were right in quashing the order upon the ground stated, the order of Sessions was to be confirmed; otherwise to be quashed, and the order of removal confirmed.

Crowder and Massey, in support of the order of Sessions.—The

pauper being born a bastard, before the 14th of August, 1834, in the parish of Church Oakley, that was his birth settlement, unless, at the time of his birth, there was a certificate from his mother's parish containing all that is required by stat. 8 & 9 W. 3, c. 30, and not only acknowledging that the mother belonged to that parish, but expressly including in that acknowledgment the child of which she was pregnant; *Rex v. Ipsley*, Burr. S. C. 650, *Rex v. Wyke*, Burr. S. C. 264. There was no legal evidence of any certificate; it was only hearsay. And there *was not even hearsay evidence of any contents of the certificate. The facts are very similar to those in *Rex v. Great Salkeld*, 6 M. & S. 408; there the case stated that the overseers of Bongate supported the bastard whilst he resided in Great Salkeld; yet the decision of this Court was in support of the order removing him to Great Salkeld, the place of his birth settlement. The facts here may lead to a suspicion that there was a certificate: but, if there was one, it should have been produced before the removing justices, or evidence given of a search for it; and then some evidence should have been given that the lost certificate referred to the unborn bastard. [*616]

Poulden (with whom was *Pashley*), contra.—The Quarter Sessions, in *Rex v. Great Salkeld*, found as a fact that the pauper was not settled in Bongate. BAYLEY, J., said: "If the circumstances were sufficient to raise a presumption of the pauper's settlement being in Bongate, it was for the Sessions, and is not for this Court, to draw that conclusion;" so that the decision there, as far as regards this point, was merely that the evidence was not conclusively binding on the Sessions. Here the Sessions have quashed the order of removal on the supposition that there was no evidence on which the removing justices could act. The facts, however, proved before them, amount to an admission, or at least evidence of an admission, of the effect of the certificate. On such an admission the Court might act; *Slatterie v. Pooley*, 6 M. & W. 664.† The weight of the evidence is not material, if there was any legal evidence.

(He was then stopped by the Court.)

*PATTESON, J.—*Rex v. Great Salkeld* is not in point. There the pregnant mother had been improperly removed to the parish of Lowther from that of Great Salkeld. The order of removal was quashed; but during the interval the child was born in Lowther. The decision in that case was, that the birth, under those circumstances, was the same thing in law as if the child had been born in Great Salkeld. As to the rest of the case, the Court merely says that, if there was evidence that the child was settled in Bongate parish, the Sessions were to draw the inference, not this Court. But in the present case the Sessions have stopped the appeal, on the ground that the evidence of relief was improperly received by the removing justices. The question therefore really comes to be, whether an admission proved by acts

is not as much to be received in evidence as one made in words? *Slat-
terrie v. Pooley* establishes that, if a party by words admits the con-
tents of a written document, such an admission is legal evidence against
him; not as secondary evidence of the contents of the written instru-
ment, but as original evidence. Such an admission is like an estoppel,
and as is well put in a note(a) to the Case of Duchess of Kingston, 20
How. St. Tr. 355, in Mr. Smith's Leading Cases, it is used, "not to
supply the absence of the ordinary instruments of evidence, but to
supersede the necessity of any evidence by showing that the fact is
already admitted." Now, if the evidence before the justices had been
*618] that the overseer acting for the parish of *Wootton St. L. said
"The child is settled in our parish, for before his birth we gave
a certificate acknowledging that the mother and the unborn child were
settled in our parish," that would have superseded the necessity of pro-
ducing or proving the certificate as against that parish. In this case,
the overseer did not say so: but the facts proved are such as to make
his conduct inconsistent with any other state of circumstances. The
evidence of the mother Harriet Sheppard is that she had a settlement
in Wootton St. Lawrence, and came to Church Oakley, being pregnant.
The overseers of Church Oakley say she shall not stay unless there be
a certificate granted by the overseers of Wootton St. Lawrence; and
after that she does stay. She is taken by the overseer of Wootton St.
Lawrence to swear who was the father. Then the child is born; and
she receives relief from the same person. The rest of her evidence
may be struck out as hearsay. But the grandmother carries the case
much farther. She proves that, for six years during which the child
resided with her in Church Oakley, the parish officers of Wootton St.
Lawrence paid her regular weekly relief for his maintenance. Surely
when they did that they meant to admit that there had been a certi-
cate. There is nothing to which those acts can be referred except such
an admission. That was evidence on which the justices might act: and
therefore the Sessions were wrong in stopping the appeal.

COLERIDGE, J.—I am of the same opinion. The case states that the
Quarter Sessions quashed the order of removal on the ground that the
*619] examinations are *insufficient, as they do not show that there was
proper evidence before the removing justices: and the question
submitted to us is, whether they were right in so holding; so that, if
the examinations contain any evidence, receivable on legal principles,
on which the Court might have supported the finding of the removing
justices, the order of Sessions is to be quashed. I think there was
such evidence, if a party may by acts admit the contents of a document,
as he may by words. In *Slatterrie v. Pooley*, PARKE, B., says: "The
reason why such parol statements are admissible, without notice to pro-
duce, or accounting for the absence of the written instrument, is, that

(a) 2 Smith's Leading Cases, 437.

they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case, where better evidence is withheld; whereas what a party himself admits to be true, may reasonably be presumed to be so. The weight and value of such testimony is quite another question." *Slatterie v. Pooley* has now become a leading case; and *PARKE, B.*, must be understood as laying down the principle on which an admission is received in evidence. That principle is the same, whether an admission is by words or by acts. It may in some cases be difficult to prove what the admission is, when it is to be inferred from acts: and that, when it is the case, will affect the weight of the evidence. But a man may by his acts make an admission as clearly and as much in detail as he possibly could by words.

*It is not necessary for the decision of this case to consider what was the strength of the evidence before the removing justices, or to examine its details; but I think here the evidence was strong. There was no surprise. The overseers of Wootton St. Lawrence were well aware of the facts; and the overseers of Church Oakley had their attention called to the necessity of a certificate. After that, Wootton St. Lawrence bears the expense of the confinement: that might be explained, as the mother was settled in the parish; but that explanation will not account for the subsequent relief of the child for six years. I do not see how that is to be accounted for, except as an admission of the existence of a certificate. The Court of Quarter Sessions might not think the evidence sufficient; but they should not have stopped the case on the ground that there was no evidence before the removing justices. It may be that, if the appeal had been allowed to go on, fresh evidence would have been given, and the fact established to their satisfaction.(a)

Order of Sessions quashed.(b)

(a) *WIGHTMAN* and *ERLE, J.*, were at the Central Criminal Court.

(b) Reported by *C. Blackburn, Esq.*

DOE, on the demise of *HOWE, v. TAUNTON.* Jan. 21.

Reported 16 Q. B. 117, note (a) (E. C. L. R. vol. 71).

*621]

*CHAPMAN v. SPELLER. Jan. 21.

Assumpsit by purchaser against vendor of goods, on an alleged warranty that vendor had title to sell; count for money had and received. Plea: Non assumpsit. The defendant at a sheriff's sale bought the goods from the sheriff for 18*l.*: the plaintiff, who was also at the sale, bought defendant's bargain of him for 5*l.*, and paid him the 23*l.* Defendant paid the sheriff the 18*l.*, and the sheriff began to deliver the goods to plaintiff; but they were then claimed as not being the property of the execution debtor, and were recovered by the true owner.

Held, that there was no implied warranty by the plaintiff that he had title, nor any failure of consideration; the plaintiff having paid the 23*l.* to the defendant, not for the goods, but for the right which defendant had acquired by his purchase; and that this consideration had not failed.

ASSUMPSIT. 1st count, on a warranty by the defendant, as vendor of goods, that he had good title to sell to the plaintiff. 2d count, for money had and received. Plea: Non assumpsit. Issue thereon.

On the trial, before ERLE, J., at the Middlesex sittings after Hilary term, 1849, it appeared that the defendant attended an auction at which the sheriff was selling goods seized under an execution, and became the highest bidder for a lot sold at 18*l.* The plaintiff's agent, who was also attending the sale, bought the defendant's bargain from him at the advanced price of 23*l.* The expressions used in making the bargain appeared to have been, that the defendant agreed "to let the plaintiff stand in his shoes for 5*l.*" The plaintiff accordingly paid the defendant 23*l.*; and the defendant paid to the sheriff 18*l.*, and directed him to deliver the goods to the plaintiff. The sheriff did deliver part: but, it being discovered that the goods sold were not the property of the execution debtor, he did not deliver the rest; and the plaintiff was obliged to restore to the true owner that portion which he had received. On these facts a verdict was entered for the plaintiff for 23*l.*, subject to leave to move to enter a verdict for the defendant. In Easter Term, 1849, a rule Nisi was obtained accordingly.

*622] **Knowles and Corrie* now showed cause.(a)—Since the rule was obtained, *Morley v. Attenborough*, 3 Exch. 500,† has been decided in the Exchequer. In that case, the actual point decided was that, where a sale was by auction, under written conditions which expressly described the subject-matter of the sale as forfeited property pledged before May, 1844, the express description of a particular title in the vendor prevented any implied warranty of an absolute title from arising; a decision not adverse to the plaintiff in this case. But it must be owned that the reasoning and dicta of the Court in that case go much farther; and PARKE, B., seems to consider that in no case is there an implied warranty of title merely from the sale of chattels. It may be questioned whether this is law. (As the Court pronounced no opinion on the general question, the argument upon it is omitted. Counsel cited the same authorities and used nearly the same arguments

(a) Before PATTESON, COLERIDGE, and ERLE, J.

as those used in *Morley v. Attenborough*.) At all events, the plaintiff is entitled to retain his verdict on the count for money had and received. The consideration has totally failed; for he has never had possession de facto of the goods bought.

Barstow, contra.—*Morley v. Attenborough* was decided on great consideration; and probably no court of co-ordinate jurisdiction would lightly question it: but in truth the question, whether a vendor of specific goods does or not impliedly warrant his right to convey the property, is quite irrelevant to the present case. Here the defendant and the agent of the *plaintiff were both buying at a sheriff's sale; [*623 and the defendant became the highest bidder. The sheriff always conveys property, sold under an execution, by a bill of sale without any warranty of title; and this is well known to every one who attends such sales. Then the plaintiff, knowing these facts as well as the defendant, offers to give him five pounds to stand in his shoes. What does that mean? It is to buy his bargain for better or for worse: the plaintiff gives his money to have all the defendant's right and remedy under that bargain, and no more. It is said that the goods were not delivered. There is no count for not delivering: but, if there were, the answer is plain: the defendant did not under these circumstances contract to deliver the goods. He contracted to transfer what right he had against the sheriff to cause him to deliver; and that right does not include any warranty. PARKE, B., said in *Morley v. Attenborough*, 18 L. J. (N. S.) Exch. 150: (a) "I recollect contending before Sir JAMES MANSFIELD, that in a sale by the sheriff a warranty of title was implied, and my position was received with much contempt and astonishment, and I was asked to produce an authority for it." The plaintiff, when he bargained to stand in the defendant's shoes, knew, or ought to have known when he bought such a chose in action, that, if he complained of a want of title in the sheriff, his complaint might be so treated.

Cur. adv. vult.

PATTESON, J., in the ensuing vacation (February 26th), delivered judgment.

*It appears that certain articles had been bought, at a sale under an execution, by the defendant for 18*l.*, which he had paid [*624 the sheriff; and that the plaintiff, who had equal knowledge with the defendant of the sale and of the title to these articles, bought from the defendant his purchase for 23*l.*: the articles were afterwards claimed and taken under a superior title; and the plaintiff was prevented from keeping possession. He therefore claimed to recover back the 23*l.* as money had and received to his use, on the ground that the vendor of personalty either warrants his title, or, at least, is bound to refund the price if he has no title. But we are of opinion that the facts do not raise the point on which he relies; that the true consideration was the

(a) This dictum is not noticed in the report in 3 Exch. 500.†

assignment of the right, whatever it was, that the defendant had acquired by his purchase at the sheriff's sale; and that this consideration has not failed.

In deciding for the defendant under these circumstances, we wish to guard against being supposed to doubt the right to recover back money paid upon an ordinary purchase of a chattel, where the purchaser does not have that for which he paid.

Rule absolute.(a)

(a) Reported by C. Blackburn, Esq.

See *Sims v. Marryatt*, Trinity Term (June 6th), 1851, post.

Upon sale of a chattel a warranty of title is implied; and upon a failure of title, assumpsit is the proper form of action: *Reed v. Barber*, 3 Cowen, 272; *Dorsey v. Jackman*, 1 Serg. & Rayle, 42; *Ricks v. Dillahunty*, 8 Porter, 133; *Chancellor v. Wiggins*, 4 B. Monroe, 201. The possession of a vendor of chattels is equivalent to an affirmation of title, and the vendor is held

to an implied warranty, though nothing be said on the subject of title between the parties; but if the property sold be, at the time of the sale, in the possession of a third person, no warranty of title will be implied, unless there be an affirmation or assertion of ownership: *M'Coy v. Arther*, 3 Barbour S. C. Rep. 323.

*625] *WAKEMAN v. LINDSEY and two Others. Jan. 22.

Held (before stat. 14 & 15 Vict. c. 99, s. 2), that, in an action against several defendants, the judge might direct an acquittal of one, against whom no evidence appeared at the close of the plaintiff's case; and thereby render him competent to give evidence for his co-defendants; provided there were no special pleas which he, with the other defendants, would be liable to costs under the New Rules for not proving.

Notice of distress for rent under 1 stat. 2 W. & M. c. 5, s. 2, stated that the broker had taken the goods mentioned in the inventory underwritten, which inventory was: "One clock and weights, &c., and any other goods and effects that may be found in and about the said premises to pay the said rent and expenses of this distress." Held sufficient, it appearing that the distress was in fact meant to include all the goods on the premises.

CASE. The first count charged that defendants, on, &c., seized and took divers goods and chattels, viz. one Dutch clock, twenty weights, two drinking tables, &c. (specifying other articles), of the plaintiff, of great value, to wit, &c., then found and being in and upon a certain messuage and premises with the appurtenances, as and for and in the name of a distress for certain supposed arrears of rent, to wit, &c., then alleged by defendants to be due and in arrear to defendant Lindsey for the said premises, &c.: nevertheless defendants, contriving, &c., afterwards, on, &c., wrongfully and unjustly sold the said goods and chattels under the said distress towards the satisfaction of the rent for which the said goods, &c., had been so distrained, without having given to plaintiff, or left at the chief mansion-house, &c., any notice of the said distress, with the cause of such taking, five clear days, or any time, before such sale: but, on the contrary thereof, defendants wholly neglected to give any such notice previous to the said sale, and therein

wholly failed, &c., contrary to the form of the statute, &c.(a) The second count was in trover for the like goods and chattels with those above mentioned. Plea, Not guilty, by statute.(b) Issue thereon.

*On the trial, before ERLE, J., at the sittings in Middlesex after Hilary term, 1849, it appeared that the only notice given [626 was a document partly in print, dated 6th October, 1848, which, as the plaintiff's counsel insisted, was defective and, legally, no notice. It was contended, at the close of the plaintiff's case, that there appeared no evidence to implicate Lindsey in the transactions complained of; and, at the instance of his counsel, ERLE, J., directed a verdict of Not guilty as to him; the plaintiff's counsel objecting to an acquittal at that time. The case then proceeded. One witness for the plaintiff was called back, and further examined on behalf of the remaining defendants: but no other evidence was offered on their behalf. Their counsel insisted that the notice was sufficient in law. The learned Judge was of that opinion, and directed a verdict for the defendants. The notice was as follows.

"Mr. White, Mr. Wakeman, or whom else it may concern.

"By virtue of an authority to me given by your landlord, Mr. Lindsey, take notice, that I have this day distrained the goods, chattels, and things mentioned in the inventory hereunder written, for the sum of 28*l.* 1*s.* 9*d.*, being for arrears of rent due the 29th day of September, 1848, for the use and occupation of a house and premises situate and being No. St. Peter's Place, in the parish of Hammersmith, in the county of Middlesex. And, unless you pay the said rent, together with the said expenses attending this distress, or replevy the said goods, within five days from the date hereof, they will be appraised and sold to satisfy the rent and expenses, pursuant to the statute in that case *made and provided. Dated this 6th day of October, 1848.

"Yours, &c.

JOHN DUNNING. [627

"The inventory to which the above notice refers, viz.

Tap-room,

1 clock and weights, &c., &c.(c)

"And any other goods and effects that may be found in and about the said premises, to pay the said rent and expenses of this distress.

"~~And~~ Removing any goods off the premises to avoid a distress, or any person aiding, assisting, or concealing the same, will subject themselves to double the value," &c. (referring to stat. 11 G. 2, c. 19).

It was assumed, on the argument in Banc, that the intention was to distrain everything on the premises.

Udall, in the ensuing term, obtained a rule nisi for a new trial, on the ground of misdirection on both the above points.

Miller now showed cause.—As to the first point, he contended that

(a) 1 stat. 2 W. & M. c. 5, s. 2.

(b) 11 G. 2, c. 19, s. 21.

(c) Sic. No other particulars were given.

it would be very unjust if a defendant who stands on the merits of his own case should be liable to the results of evidence called by his co-defendants, and to which he cannot reply; it being the plaintiff's act, not his, that other persons are made defendants with him. PARKE, B., in *Child v. Chamberlain*, 1 M. & Rob. 318,(a) stated it to be a rule "settled by the unanimous decisions of all the Judges," that, when at *628] the close *of the plaintiff's case there is no evidence against a particular defendant, he is then entitled to an acquittal. Lord DENMAN, C. J., in *Sowell v. Champion*, 6 A. & E. 407 (E. C. L. R. vol. 33),(b) does not recognise the right, but considers the practice as lying in the Judge's discretion. That expression of opinion, however, does not overrule the previous determination of the Judges. [COLERIDGE, J.—It is singular that the Judges who decided that case should not have been aware of the unanimous resolution in 1834.] Lord DENMAN, C. J., says, in *White v. Hill*, 6 Q. B. 487, 491 (E. C. L. R. vol. 51): "I know of no meeting of the Judges at which any such resolution has been come to as that spoken of in *Child v. Chamberlain*." But the resolution may have been come to before his Lordship was on the Bench. Lord DENMAN, C. J., says also: "Where one party is acquitted, he might be called for the defence, and prove that he, and not any of the other defendants, was the real wrongdoer." But there would be no injustice in that. [COLERIDGE, J.—Where there are special pleas, upon which all the defendants may be liable to costs, the Judge must have a discretion.] That was so considered in *Hitchen v. Teale*, 2 M. & Rob. 30: but the only plea here is Not guilty by statute. [COLERIDGE, J., mentioned *Spencer v. Harrison*, 2 Car. & Kir. 429 (E. C. L. R. vol. 61).] If the acquittal rests in the discretion of the Judge, that discretion was rightly exercised here. [COLERIDGE, J.—As no witnesses were called for the defence in this case, the point seems immaterial.]

Then, as to the notice. 1 stat. 2 W. & M. c. 5, s. 2, authorizes the *629] sale within five days next after "such *distress taken, and notice thereof (with the cause of such taking) left" at the chief mansion-house, &c. Nothing is said of an inventory; and it is not objected that the present notice omits any other information. The form here is filled up, under the head of Inventory, with the words "Tap-room. One clock and weights, &c., &c. And any other goods and effects that may be found in and about the said premises, to pay," &c. If part, only, of the goods on the premises were to be taken, a more specific statement might be necessary; but it is useless where all are distrained. The tenant has notice that the distrainer seizes everything. [PATTESON, J.—The words are not even, any goods that "are on the premises," but "any" "that may be;" though two or three days after. COLERIDGE, J.—The notice is that such things "have" been distrained. If some do not come to the broker's hands till the next day, "have" they

(a) January, 1834.

(b) Hilary Term, 1837.

been distrained?] The whole must be read together, and cannot be taken to mean so. It is impossible to say here that notice was not given of the seizure of all the goods that were in fact sold. Practically, the broker puts his hand on a chair or a table in the name of all the goods on the premises. [ERLE, J.—An assignment is, generally, of all the goods on the premises; but the notice may come under a different rule. PATTESON, J.—If there was some privileged chattel on the premises, could the broker, having used this form, deny that he had taken it?] The form intimates that he has distrained all. But, if the inventory were specific, and included something not distrainable, it would not be the less an inventory. [COLERIDGE, J.—It is very shameful to conduct a distress in this careless manner, taking all a man's property, as appears to be *done here.] The whole question on this rule is, whether the tenant has such information as gives him the opportunity of objecting to the distress, or replevying. The Act requires that the notice shall be in writing (as was held in *Wilson v. Nightingale*, 8 Q. B. 1034 (E. C. L. R. vol. 55)), but imposes no rule as to form.

Udall, contrà.—1 stat. 2 W. & M. c. 5, gave a new privilege to landlords, by enabling them to sell the goods, which before could only be impounded. The conditions annexed should be observed strictly. The distrainor is not obliged to impound the goods on the premises; if he removes them, the tenant cannot know, and still less can any other owner of goods which may have been taken, what has been carried away. If such party, or the tenant himself, replevies, the bond, by stat. 11 G. 2, c. 19, s. 23, is to be in double the value of the goods seized; but it may be impossible to fix a value, where the distrainor professes to seize everything that may be on the premises. The actual rent would be no guide in such a case. In the Appendix to Impey's edition of *Gilbert On Distress and Replevin*, pp. 230, 231, directions are given for executing a distress; and the form of inventory there is "one table, &c. (setting forth the goods.)" [ERLE, J.—Would "all the furniture in the front attic," or "all the bedding," be sufficient? I have seen inventories mentioning "all the ricks" in such a yard, "all the horses" in such a stable. How particular must the broker be? Sometimes he is distraining at the peril of his life.] At all events a notice of taking any goods that "may be *found," &c., cannot be sufficient. And the notice here points out a penalty if "any goods," of those so generally mentioned, are removed.

Then, as to the acquittal. [COLERIDGE, J.—If no witness was examined for the defence that point is immaterial.] A witness was called back and cross-examined. [COLERIDGE, J.—If that was wrong, it might have been objected to at the time. It cannot make the acquittal improper.] *Udall* referred to *White v. Hill*, 6 Q. B. 487 (E. C. L. R. vol. 51), and noticed the difference between a special plea and Not

guilty by statute, as shown by *Spencer v. Harrison*, 2 Car. & Kir. 429 (E. C. L. R. vol. 61).

PATTESON, J.—Whatever rule may have been laid down respecting the acquittal of one defendant (as to which some doubt appears to be raised, and we are not now called upon to say anything, and had better not), it clearly was competent at all events to the learned Judge to direct an acquittal when the plaintiff's case was closed. There was no witness afterwards specifically called by the defendants, if that would have made a difference, which I do not say that it would. If indeed there had been an affirmative plea, the proof of which lay on the defendant who was acquitted, he could not have claimed an acquittal and then been called to prove his own plea. But the plea of Not guilty by statute is a different thing. As to the notice: the wording of this form is extraordinary; and I cannot see how it is consistent with good sense to say that the broker has seized all that "may be found" on the premises. But perhaps the fair interpretation may be, all that are *632] there: and, if in fact the broker has taken *everything without exception, the practice may be very bad and loose, but I cannot say that it vitiates the sale. A notice of distress must say, not only "I have distrained," but "I have distrained" some goods. But, as in this case all were taken, I am not prepared to say that the notice, as framed, is bad. If only part had been taken, it might have been necessary to specify that part.

COLERIDGE, J.—If the present case had been brought within the authority of *Hitchen v. Teale*, 2 M. & Rob. 30, the motion, on the first point, might have been well founded. That case does not infringe the position said to have been laid down by the Judges before the establishment of the New rules. These have raised a new question upon liability to costs where there are affirmative issues to be maintained by the defendants; upon which question *Hitchen v. Teale* turned. Here the defendants have pleaded only Not guilty, by statute. It is true that that lets in any case which a defendant may have to prove; but, in this instance, it does not appear that the defendant Lindsey had any special defence to prove. It was as if he had pleaded Not guilty at common law. On the other point I have felt doubt, and decide with reluctance. The object of 1 stat. 2 W. & M. c. 5, s. 2, was that the party distrained upon should have notice of what was taken. It is not fair to evade giving this by saying, a clock, and any other goods that "may" be found "in and about" the premises. Still if the party intends bonâ fide to take all, he may assume that the tenant knows *633] sufficiently what they are, and that *to say "all" is enough. I do not feel justified in laying down that, in such a case, there must be a specification; though it is difficult to draw a line, and I am fearful of deciding that which may lead brokers to use much too general forms.

ERLE, J.—The questions put after the acquittal were only some that had been forgotten by oversight; when put, they did not in the least alter the bearing of the case; and no one applied to cancel the verdict of acquittal by reason of their having been asked. As to the notice, the peril which has attended the practice used in this case will, I should hope, caution brokers against using forms like that which the Court has felt so much reluctance in sanctioning. There is evil in the use of such forms; yet there may be more if a landlord is held liable to an action for the use of words somewhat too general, and if it is rendered necessary that at the time of making a distress everything must be brought out for the purpose of being described and numbered. The word “all” does give a description; so far that, if all be more than is required, the landlord is in peril for having taken too much.

Rule discharged.

***M'SWINEY v. The Corporation of THE ROYAL EXCHANGE ASSURANCE. [Feb. 24, 1849.]** [*634

Plaintiff in London contracted to buy of D. 6000 bags of rice, to arrive from Madras by the ship E. B. before the end of May: and he contracted with W. to sell him the same rice, to arrive as above, at an advanced price. Plaintiff then effected an insurance *at and from Madras to London on profit on rice, loaden or to be loaden*, and also upon the body, tackle, &c., of the ship E. B., beginning the adventure upon the goods from and immediately after the loading thereof aboard the said ship at Madras. The ordinary perils were insured against. Premium 2½ 10s. per cent. The rice was all ready to be shipped on board the E. B. and conveyed to London for plaintiff's vendors, and 1200 bags were actually on board, when, by perils of the sea, the ship was disabled, and prevented from performing the voyage, and the rice on board spoiled; and plaintiff's contracts both of purchase and sale became inoperative. In an action by plaintiff on the policy, for a total loss in respect of 4800 bags, the insurers having settled for the 1200:

Held, by the Court of Queen's Bench:

That the plaintiff's expected profit was an insurable interest, and well insured by this policy.

And that it was not necessary to the plaintiff's right of recovery that the 4800 bags should have been actually on board; the ship having been at Madras ready to take in the cargo, and having been disabled from doing so by no cause but peril of the sea.

Held, by the Court of Exchequer Chamber, reversing the judgment in Q. B.:

That the plaintiff's interest in profit was insurable: But

That it was not properly insured by a policy in this form, except as to the rice actually put on board.

And that, if the rice on shore could have been considered a subject-matter of the insurance under this policy, the loss in respect of such rice was not occasioned by peril of the sea, within the meaning of the policy, but was only consequential upon other loss occasioned by such peril.

COVENANT. The declaration stated that, before the making of the policy after mentioned, viz., on the 9th January, 1847, at London, the plaintiff agreed to buy of one John Drake, as and being the agent of certain persons carrying on business under the name of Drouhet, Gardiner, & Company (whose names are not otherwise known to plaintiff), and J. D., as and being such agent, then agreed to sell to plaintiff,

certain goods then supposed to have been shipped at Madras on board of, and expected to arrive by, a vessel called the *Edward Bilton*, from Madras, to wit, 6000 bags of rice at 19s. per cwt., to agree with certain *635] samples, and to arrive on or before the end of *May then next, guarantied equal in quality to said samples or an allowance to be made: the ship to be at liberty to go to any port in Great Britain, &c. (Then followed terms of the contract, as to mode of payment and allowances, which it is unnecessary to set forth: see p. 640, post). And, the said contract for purchase, &c., having been so made, afterwards, to wit, on 16th January, A. D. 1847, plaintiff agreed to sell to certain persons, to wit, certain persons carrying on trade and business under the name and style of Messrs. J. and C. Woodhouse (names not otherwise known to plaintiff), who then agreed to buy of plaintiff, the said goods, to wit, the said 6000 bags of rice then still supposed to have been shipped, and expected to arrive, as aforesaid, at the price of 20s. 6d. per cwt., and upon the like terms and conditions in all respects, except the amount of the price thereof, as were agreed upon between the plaintiff and the said John Drake as first aforesaid. And the plaintiff thereupon then, and from thence until and at the time of the making the policy of insurance hereinafter mentioned, had just reason to expect and did expect that he would, by reason and means of the premises, and of the arrival of the said rice as aforesaid, and the performance of the said contracts, make a profit (to wit) to the amount of 675*l.*, on and in respect of the said rice. And thereupon, after the making of the said contracts, and whilst the said rice was still supposed to have been shipped, and expected to arrive, as aforesaid, to wit, on 18th January, A. D. 1847, a certain policy of insurance was, at the instance of the plaintiff, and in consideration of certain premiums, &c., *636] made by and sealed with the common seal of the defendants *(profert): By which policy of insurance the plaintiff, as well in his own name as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain, &c., did make assurance upon the expected profit on the said rice, to wit, the profit aforesaid, and cause himself and them and every of them to be assured by the defendants, lost or not lost, in respect of the same, at and from Madras to London: which said policy was and is of the tenor following, that is to say:

The declaration then set out the policy, by which "*E. M'Swiney, as well in his own name*" as in those of all to whom it might appertain, made assurance, "*lost or not lost, at and from (a) Madras to London, with leave to touch at all ports and places on either side of and at the Cape of Good Hope for all purposes, being on profit on rice*, upon any kind of goods and merchandise whatsoever laden or to be laden; and also upon the body, tackle," &c., of and in the ship "*called the Edward*

(a) The words in Italics were written on blanks of the printed form.

Bilton, burthen," &c., whereof is master, &c.: "beginning the adventure upon the said goods and merchandises from and immediately following the loading thereof aboard the said ship at *Madras*: and upon the said ship, &c.; and so shall continue and endure during her abode there upon the said ship, &c.; and further until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, shall be arrived at London: upon the said ship, &c., until she hath there moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be there discharged and safely *landed. And it shall be lawful," &c.: liberty for the ship to touch and stay, &c.; valuation clause (not filled up); [*637 perils insured against to be "of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints," &c., of all kings, princes, &c., "barratry of the master and mariners; and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises and ship, &c., or any part thereof:" liberty to the assured to sue, labour, &c., about the defence, recovery, &c.: policy to be of as much force as the surest policy, &c.: And the insurers confessed themselves paid "the consideration due unto them for this assurance by *the assured*, at and after the rate of *two pounds ten shillings* per cent." Sum insured, "*six hundred pounds*:" clause as to average. The declaration then averred that the said Corporation thereupon became insurers to the plaintiff for the said sum of 600*l.*, upon and in respect of the said expected profits on the said rice, so agreed to be bought and sold as aforesaid, against the risks aforesaid.

It was then averred, That, heretofore and before the damage and loss after mentioned, to wit, on 20th October, A. D. 1846, the said ship was at *Madras* aforesaid, and was then ready and about to take the said rice, to wit, the said 6000 bags thereof, on the voyage in the said policy mentioned to London aforesaid; and the said rice, to wit, the said 6000 bags thereof, being of good quality, to wit, equal to the said samples, was then ready and about to be taken in the said ship on the said voyage in the said policy mentioned, and consigned to the said persons who agreed to sell the same to the plaintiff as [*638 *aforesaid; and a part, to wit, 1200 bags, of the said rice were then shipped and loaded on board the said ship for the purpose of being carried on the said voyage to London aforesaid; and the residue of the said rice, to wit, 4800 bags thereof, were then at *Madras* aforesaid ready and about to be loaded on board the said ship for the purpose of being carried on the said voyage to London aforesaid; and the said rice, to wit, the said 6000 bags thereof, were then ready and about to be, and would then have been, carried to London in the said ship, and the said profits made by the plaintiff in respect thereof, but for the damage and loss

hereinafter mentioned. And the said ship then, and whilst she was at Madras aforesaid ready and about to take on board the rest of the said rice and proceed therewith on the said voyage, was by the perils of the seas and by stormy and tempestuous weather greatly damaged and injured, and rendered incapable of taking, and by reason thereof did not take, the said rice or any part thereof on the said voyage to London, &c., so as to enable plaintiff to make the said profit, or any profit, thereof: and the said part of the said rice so on board of the said ship was then by reason of the said perils spoilt and lost, so that no profit could be or was made of the same: and the said residue of the said rice was then by the said perils prevented from being shipped and loaded on board the said ship and carried on the said voyage. Averment that, by reason of the perils aforesaid, the same being perils insured against by the said policy, the said vessel was wholly prevented from arriving, and did not arrive, with the said rice or any part thereof on or before the end of May, 1847, which had elapsed before this suit, *639] or at all, so as that *plaintiff could make the said profit or any profit of the same; and the said profit on the said rice so insured, &c., during the said risk, &c., then became and was, by perils insured against by the said policy, to wit, by the said perils of the sea, &c., wholly lost to the plaintiff, and plaintiff was thereby damnified to a large amount, to wit, 675*l*. Averments, that plaintiff, at the time of insurance, and during the period of risk, was interested in the profits insured, to wit, to the whole amount insured; that he performed all things on his part, &c.; and that defendants had notice, &c., and were requested by him to pay, &c.

Pleas: 1. By statute :(a) except as to the said part of the rice alleged to have been loaded on board the said ship, and the said expected profit of the plaintiff thereon, that defendants have not broken the covenants, &c.; conclusion to the country. Issue thereon. 2. As to the causes of action excepted, payment of 102*l*. into Court, which the plaintiff accepted.

On the trial, before Lord DENMAN, C. J., at the sittings in London after Trinity term, 1848, a special verdict was found, as follows.

The jurors, &c., say, &c.: That on 9th January, A. D. 1847, the plaintiff purchased of Messrs. Drouhet, Gardiner & Co., through their agent, Mr. John Drake, 6000 bags of rice, then supposed to have been shipped at Madras on board the Edward Bilton hereinafter mentioned, and expected to arrive at London before the end of May, 1847. That the purchase was effected by bought and sold notes in the usual way, signed by Messrs. Kemble & Trower, the brokers of the parties.

*That the bought note, with which the sold note corresponded, *640] was as follows.

London, 9th January, 1847.

Bought for Mr. E. M'Swiney,

of Mr. John Drake, for account of his principal,
ex Edward Bilton, a Madras.

6000 bags of rice at 10s. per cwt. as per samples marked 1 to 6 (particulars specified at foot), to arrive on or before the end of May next; guarantied equal in quality to said samples, or an allowance to be made. The ship to be at liberty to go to any port in Great Britain: if to London, the rice to be landed on the usual terms, but if to an outport, then the London landing charges to be allowed the buyer, he paying the same at port of discharge. (Here followed terms as to the mode of payment for the rice in either event.) In the event of any damage, then an allowance to be made in the customary manner. (Then followed the particulars above referred to.)

That on 16th January, 1847, the plaintiff sold to Messrs. M. I. & C. Woodhouse the said 6000 bags of rice, then still expected to arrive as before mentioned, at an advance of price of 1s. 6d. per cwt., but upon the same terms in all other respects as those upon which the plaintiff had himself bought them; and that that sale was also effected by bought and sold notes signed by the brokers of the parties in the usual way: and that the sold note on that sale, and with which the bought note corresponded, was as follows.

London, 16th January, 1847.

Sold for Eugene M'Swiney, Esquire,

to Messrs. M. I. & C. Woodhouse in our name
p. Edward Bilton a Madras,

600 bags of rice a 20s. 6d. per cwt., as per samples marked 1 to 6 (particulars specified at foot), to arrive on or before the end of May next; guarantied, &c. (as in the bought note). The ship to be at liberty to go to any port in Great Britain; if to London, the rice to be landed on the usual terms, but if to an outport, then to be weighed overside at seller's expense. (Here followed terms as to the mode of payment for the rice in either event.) In the event of any damage, then an allowance to be made in the customary manner. (Then followed the particulars.)

*That a bag of rice weighs about $1\frac{1}{2}$ cwt.: and that Messrs. M. I. & C. Woodhouse, the purchasers, have continued solvent: [*641 and that the profit upon the said transactions, in case the said rice had arrived by the said vessel before the end of May, 1847, would have been 675l. And that on 18th January, 1847, after the purchase and sale of the rice, and whilst it was still expected to arrive by the said vessel, the plaintiff applied to the defendants to insure profit on rice, meaning the profit arising on the transaction comprised in the bought note of the first contract and the sold note of the second contract before mentioned; and that a policy of insurance was then thereupon effected by the plaintiff with the defendants in the words and figures in the declaration mentioned and set forth. That a certain part of the said policy was in print, and was in the common form used by the defendants in their business: and that the said part so in print was as follows, that is to say. The verdict set out the printed form, with blanks for the parts afterwards filled up in writing. See p. 636, ante.

That on 18th October, 1846, the ship Edward Bilton arrived and was

at Madras for the purpose of taking the 6000 bags of rice in question from Madras to London, for which purpose she had been previously chartered by the plaintiff's vendors; and that the whole of the 6000 bags of rice in question was then at Madras ready and about to be shipped on board the said vessel to be carried from Madras to London for the plaintiff's vendors. And that, on 21st October, 1846, the vessel was blown out to sea by a gale of wind, and returned to Madras on 26th October, 1846; and that 1200 bags of the rice only were then *642] loaded on board the said vessel, and the remaining 4800 bags were ready and about to be shipped on board of her when, on the 24th November, 1846, another violent gale came on, which then drove the said vessel out of Madras roads to sea, and there dismasted and otherwise damaged her, and spoiled the said 1200 bags of rice. And that afterwards she put back to Madras, where she again arrived on 27th November, 1846, and then, after having discharged the 1200 bags of rice, which were so damaged by the sea that they were obliged to be sold on the spot, and never came to London, she was found so injured by the said gale as to be obliged to proceed to Calcutta for repair, and was wholly disabled from taking on board the remaining 4800 bags of the rice in question, and from proceeding from Madras to London on the voyage mentioned in the policy, and which she would have done, and would in ordinary course have arrived in London before the end of the said month of May, whereby the contracts aforesaid would have been performed and the said profits realized thereon by the said plaintiff, but for the injuries and damage aforesaid. That the said ship the Edward Bilton was under repair at Calcutta until 27th May, 1847, and sailed thence on that day for London direct with a cargo, and arrived in London on 24th November, 1847, without any of the said rice on board. And that, in consequence of the said damage to the said Edward Bilton, the said 4800 bags never were loaded on board of her, but were afterwards sent to London by another vessel, the Mary Nixon, but did not arrive until some time in the month of June, 1847; and that both the said contracts consequently became inoperative, and the said profit was wholly lost by the plaintiff. And that *643] defendants, before this action, had notice of the matters before found by the jury, and were requested by the plaintiff to indemnify him against his said loss, but declined to do so, on the ground that, as they contended, they were only liable to make good to the plaintiff the loss of the said profit to arise in respect of the quantity of the rice in question actually shipped on board the Edward Bilton, but not in respect of the residue of the said rice which was not actually loaded on board the vessel. But whether, &c. The verdict then referred to the Court, in the usual form, the question, whether or not the defendants have broken the covenants, &c., so far as regards the causes of action to which the first plea is pleaded.

The case was argued on the special verdict in Hilary term, 1849,^(a) by *Martin* for the plaintiff, and Sir *F. Thesiger*, for the defendants. The judgment of the Court, and the subsequent discussion in the Exchequer Chamber, make it unnecessary to report the arguments.

Cur. adv. vult.

Judgment was delivered in Hilary vacation (February 24th), 1849, by

Lord DENMAN, C. J.—This was an insurance on the profits to arise upon the sale by the plaintiff of 6000 bags of rice in case they had arrived by the *Edward Bilton*. The plaintiff had purchased the rice, which was at the time supposed to have been shipped on board the *Edward Bilton* on the 9th of January, 1847; and bought and sold notes were regularly delivered. On the 16th of January the plaintiff sold the rice at an advance of 1s. 6d. per cwt., and bought and sold notes were in like manner regularly delivered. *The rice was expected to arrive by the *Edward Bilton* in May, 1847. On the 18th of [644 January the plaintiff insured the profits arising upon the sale by him. The policy was “at and from Madras to London” “on profit on rice,” “beginning the adventure upon the said goods and merchandises from and immediately following the loading thereof aboard the said ship at Madras.” On the 26th of October, 1846, the *Edward Bilton* was at Madras, ready to take the 6000 bags of rice, which were also there lying ready to be shipped on board of her, she having been chartered for the purpose. 1200 bags had been loaded on board and the rest were about to be loaded at Madras, when the ship was blown out to sea, and so much damaged that the 1200 bags were spoilt and obliged afterwards to be relanded; and she was unable to bring them or the remainder to England.

Since the case of *Lucena v. Craufurd*, 2 New Rep. 269,^(b) there is no doubt that there may be an insurance upon profits: but it was contended, on the part of the defendants, that, to give an insurable interest, the goods out of which the profits were to arise must have been on board the ship; and that this case was within the principle of the decisions in *Stockdale v. Dunlop*, 6 M. & W. 224,[†] and *Knox v. Wood*, 1 Campb. 543. Both those cases are however clearly distinguishable from the present.

In *Stockdale v. Dunlop* there was no binding contract for the sale to the plaintiffs of the goods from which the profits were to arise: they had, as observed by the Court, no legal interest whatever in the subject-matter of the insurance: there was merely an expectation of possession on the part of the plaintiffs, founded *on a verbal promise [645 of the vendors, which was not binding upon them; and therefore there was no insurable interest. In the present case, the plaintiff had

(a) January 19th, 1849. Before Lord DENMAN, C. J., PATTERSON, COLERIDGE, and WIGHTMAN, Js.

(b) In Dom. Proc. on Error from Exch. Ch.; *Lucena v. Craufurd*, 3 B. & P. 75.

purchased the rice by a valid and binding contract, and the profit was fixed and ascertained by another valid and binding contract entered into by him with his vendees. In the case of *Knox v. Wood*, the vessel was lost upon her outward voyage; and no cargo was ready for her homeward voyage; upon which the profits were to arise, or even contracted for; so that, as Lord ELLENBOROUGH observed, the interest of the assured was the expectation of an expectation, which was not an insurable interest.

In the present case the ship was actually at Madras, where the goods were lying ready to be put on board in pursuance of a valid contract, and part actually was on board at the time of the loss. It appears to us that the case, in principle, falls within those of *Devaux v. J'Anson*, 5 New Ca. 519, and *Warre v. Miller*, 4 B. & C. 538 (E. C. L. R. vol. 10), and *Flint v. Mesurier*,^(a) reported in *Park on Insurances*; and that where there is a legal certainty that profit will be made if goods arrive, and that the goods are ready to be shipped under a valid contract, there is an insurable interest; and that, if the loss arises from a peril insured against, such as the perils of the sea, the underwriters are responsible.

The risk of loss of profits attached when the vessel was at Madras, ready to take in her cargo, and having actually begun to take it in; and the loss occurred by the ship being blown off and sustaining too much damage to take in all the cargo, which was a peril of the sea.

*646] *Upon the whole, we are of opinion that the plaintiff is entitled to our judgment. Judgment for plaintiff.^(b)

(a) 2 Park Ins. 563, Hildyard's Ed.

(b) See the next case.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

The Corporation of The ROYAL EXCHANGE ASSURANCE v. M'SWINEY. Jan. 22.

(For marginal note see p. 634, *antè*.)

JUDGMENT having been signed in this case for the plaintiff below, the defendants below brought error in the Exchequer Chamber, assigning for errors that it appears by the record that defendants have broken their covenants so far as regards the matters pleaded to in the first plea, and that judgment is given for the plaintiff, whereas judgment ought to have been given for the defendants. Joinder. The case was argued on the writ of error in Michaelmas vacation (November 27th),

1849, before MAULE, CRESSWELL, WILLIAMS, and TALFOURD, Js., and PARKE, ALDERSON, ROLFE, and PLATT, Bs.

Sir *F. Thesiger*, for the plaintiffs in error (defendants below).—The plaintiff below could not have an insurable interest in the expected profits without having an insurable interest in the goods; and in those he could have no insurable interest till they were put on board. Until then, neither goods nor profits could be the subject of perils of the seas. The judgment of the Court *of Queen's Bench has proceeded too far on a supposed analogy [*647 to the case of freight. The subjects of insurance are ship and goods, to which freight and profits are incident. There can be no insurable interest in freight without ownership of the vessel, nor in profits without an actual interest in the goods, the corpus on which the profits are to arise. In *Barclay v. Cousins*, 2 East, 544, 547, where profits of a cargo were held insurable, LAWRENCE, J. (delivering the judgment of the Court), treated them as incident to the goods insured. After describing the protection by insurance as embracing generally "those losses and disadvantages which, but for the perils insured against, the assured would not suffer," he proceeds: "In every maritime adventure, the adventurer is liable to be deprived not only of the thing immediately subjected to the perils insured against, but also of the advantages to arise from the arrival of those things at their destined port. If they do not arrive, his loss in such case is not merely that of his goods or other things exposed to the perils of navigation, but of the benefits which, were his money employed in an undertaking not subject to the perils, he might obtain, without more risk than the capital itself would be liable to: and if, when the capital is subject to the risks of maritime commerce, it be allowable for the merchant to protect that by insuring it, why may he not protect those advantages he is in danger of losing by their being subjected to the same risks?" Lord ELLENBOROUGH asked, in *Eyre v. Glover*, 16 East, 218, "are profits anything more than an excrescence upon the value of the goods beyond the prime cost?" *Reference was made in the Court below to *Lucena v. Craufurd*, 2 New Rep. 269, 302, where LAWRENCE, J., [*648 said: "Interest does not necessarily imply a right to the whole, or a part of a thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in the subject of the insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment, or prejudice to the person insuring: and where a man is so circumstanced with respect to matters exposed to certain risks or dangers, as to have a moral certainty of advantage or benefit, but for those risks or dangers he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing, is to be so circumstanced with respect to it as to have benefit from its exist-

ence, prejudice from its destruction. The property of a thing and the interest devisable" (derivable) "from it may be very different: of the first the price is generally the measure, but by interest in a thing every benefit and advantage arising out of or depending on such thing may be considered as being comprehended." But these words must be understood with reference to the subject-matter of decision in that case, namely the interest of the Commissioners for sale of Dutch property under stat. 85 G. 3, c. 80, s. 21, in Dutch ships actually seized under orders of the British government, and insured by the Commissioners afterwards. If the language of LAWRENCE, J., be supposed to mean that for the purpose of insurance it is not necessary to have an actual interest in the subject-matter, it is directly at variance *649] with *Stockdale v. Dunlop*, 6 M. & W. 224,† where the Court of Exchequer held that the plaintiffs had no insurable interest in the profits of an expected cargo which they had agreed to purchase, the contract not being a legally binding one. The accessory cannot be more protected than the principal; and by the terms of this policy the goods were insured only "from" "the loading thereof aboard." It is true that in *Flint v. Flemyng*, 1 B. & Ad. 45 (E. C. L. R. vol. 20), the plaintiff recovered for the loss of freight on goods which had not yet been shipped; and that decision was followed up in *Devaux v. J'Anson*, 5 New Ca. 519: but in these cases the freight was lost by loss of the ship; the ship was the principal; and, that being destroyed, the freight never could be earned. Here the principal, the 4800 bags of rice, never was destroyed; there was merely a delay in its arrival. As PATTERSON, J., observed on the argument below, the assured is seeking to engraft on the insurance a guarantee that the goods shall arrive within a certain time. The loss in question does not arise from any peril insured against. Supposing even that the goods had been shipped, and the vessel had sailed and been obliged to put back, and by the consequent delay a market for the cargo had been lost, the goods themselves being entirely uninjured: that would not have been a loss within the policy. The judgments of this Court in *Anderson v. Wallis*, 2 M. & S. 240, and *Everth v. Smith*, 2 M. & S. 278, are clear on this point, *650] as to goods and freight; and there can be no different rule as to profits.(a) It *cannot be contended that there is in this case any insurance, virtual or otherwise, upon the ship; the omission to strike out some words in the printed form may give rise to this suggestion; but the declaration states the insurance to be on the expected profit upon rice.

Martin, *contra*.—First: The policy was in reality an undertaking that the ship should not be prevented from arriving with the goods by

(a) PATTERSON, J., observed, on the argument below: "If Drouhet & Co. had insured the rice, they could not have recovered for the 4800 bags, because of their arrival. Supposing they had also insured the profits in the language of the present policy, could they have recovered for them? If so, the profits would seem not to be a mere excrescence."

an injury for which the ship owner or the owner of the goods might have recovered: and this meets the observation of RATTESON, J., referred to on the other side. Secondly: the loss was an entire destruction of that which was the subject-matter of insurance.

What that subject-matter was, is the real dispute between the parties. The insurance was upon the profits of a contract. M'Swiney had agreed to purchase rice of Drouhet & Co.; but nothing actually passed to him by that agreement: something remained to be done before the property in the rice vested in him; it was to arrive and be weighed out. Then M'Swiney sells to Messrs. Woodhouse; and he insures the profit to arise from the subcontract. The interest so insured is not an excrescence from the goods. That expression applies to the ordinary case where a man has actually bought goods and expects to get an advanced price for them at the port of discharge. Here the declaration alleges that the plaintiff at the time of effecting the policy had reason to expect, and did expect, that he would, "by *reason and means of the premises, and of the arrival of the said rice as aforesaid, and the performance of the said contracts, [*651 make a profit," &c. If that profit was lost by a peril of the sea operating on the ship and part of the goods at Madras, the policy attached. It is not correct to say generally that this is setting up a guarantee that the ship should arrive in London by the end of May. The liability of the insurers depended on the ship being injured by a peril insured against, and thereby prevented from arriving. [CRESSWELL, J.—Suppose the ship had been stranded but not injured, and a delay had resulted.] It is not necessary to say whether on a delay caused by such an accident, or by winds, the policy would attach. But it would if the delay were occasioned by the happening of a peril insured against. [PARKE, B.—If, in consequence of such a peril, the ship had been delayed, but arrived on the 1st of June, would that have been a loss?] That is not the present case. Ordinarily the subjects of marine insurance are ship, goods, and freight: but an insurance may be on something which is neither. Nothing creates a limit in this respect but the statute 19 G. 2, c. 37. The policy here shows expressly that the insurance contemplated was upon "profit on rice:" that is a legal insurance, and analogous to insurances of freight ("the benefit derived from the employment of the ship;" *Flint v. Flemyng*, 1 B. & Ad. 48 (E. C. L. R. vol. 20)); or of commission, which is the interest a man has in the sale of goods arriving at their port and realizing a profit by his exertion, though he has no interest in the goods themselves. "Commissions, as to their insurability, stand on the *same ground as profits; and, [*652 as we have already seen, are clearly established in English law, to be lawful subjects of insurance. But" the assured "must show, that, at the time of the loss, the goods, out of the sale of which the profits or commissions were expected to arise, were either actually on

board, or ready or contracted to be put on board, so that nothing but the loss intervened between the assured and his realizing such profits or receiving such commissions:" 1 Arnould on Insurance, 241; where *Knox v. Wood*, 2 Park Ins. 564, S. C. 1 Camp. 543, is cited. The language of LAWRENCE, J., in *Barclay v. Cousins*, 2 East, 547, cited on the other side, and in 1 Arn. Ins. 204, shows that the interest in question is one of those which may legitimately be insured.

Stockdale v. Dunlop, 6 M. & W. 224,† is no authority against the plaintiff below. There the contract on which the interest depended was one which could not be enforced; it was, as PARKE, B., said, "an engagement of honour merely." The same learned Judge says there: "I admit that profits may be insured, but that is on the ground that they form an additional part of the value of the goods, in which the party has already an interest. Thus, the owner of goods on board a vessel may insure the profits to arise from them. So may a consignee or a factor in respect of his commission. So may captors, because they have a lawful possession, coupled with a well founded expectation that their claim to retain the goods will be allowed. So may the owners of slaves, or a captain in respect of his commission. In these cases there is either an absolute or a special property in possession." [PARKE, B. *653] —I was *contemplating the case of goods actually on board.] The judgment proceeds: "There the profits are insured as an additional value upon the goods, in which the insurer has a present interest." That would not apply to the case of a factor. "Here, however, the assured are not interested at the time of the goods being put on board, but only upon their arrival." In the present case there was an actual interest when the goods were put on board, by a subsisting and valid contract. It was an "interest derivable" from a thing, as distinguished from "the property of a thing" by LAWRENCE, J., in *Lucena v. Craufurd*, 2 New Rep. 302.

If it be asked, when this policy attached, the answer is, when the goods were ready for shipment at Madras, and the vessel ready to receive them. The effective words as to the commencement of the risk are "at and from." In *Montgomery v. Eggington*, 3 T. R. 362, the insurance was on freight valued at 1500*l.*; 500*l.* worth was on board, and goods to the remaining amount ready to be shipped, when the vessel was driven from her moorings and lost; and the assured recovered in respect of the whole. In 1 Arn. Ins. 470, the result of that and other cases is stated to be: "That where a full cargo has been contracted for, and is ready to be shipped on board at the time of the loss, and the ship, being otherwise in a condition to receive the cargo, is only prevented from doing so by the intervention of the perils insured against, the policy on freight attaches, and the underwriters are liable for the loss of the whole freight which would have been earned on the voyage, even though no

part of the cargo has ever been shipped on board at all." *This applies equally to the interest insured here. Unless the words "at and from" have the effect here contended for, there is no difference between an insurance on freight or on profits and an insurance on goods, in which case the risk begins from the loading on board. [CRESSWELL, J.—The contract with Messrs. Woodhouse was for goods "to arrive on or before," &c. According to *Lovatt v. Hamilton*, 5 M. & W. 639,† it was no binding contract for goods which did not so arrive.] Johnson v. Macdonald, 9 M. & W. 600,† (cited, with the preceding and other decisions, in *Smith's Mercantile Law*, 469, note (f), 4th ed.) was a similar case. The contingency by which the plaintiffs in those cases were defeated is that which the present policy is intended to provide against. In 2 Park Ins. 564 (*Hildyard's ed.*), it is said that "an open policy on profits is good, the assured proving an interest in the cargo;" and *King v. Glover*, 2 New Rep. 206, is cited, where, "in the Common Pleas, after much deliberation, all the Judges of that Court were of opinion that an African captain, who, besides his wages, was entitled for his trouble and attention in purchasing slaves on the coast of Africa, and selling and disposing of them in the West Indies, to so much per cent., and other privileges, had a good insurable interest in this remuneration." There the insurance was "at and from" the coast of Africa, and would have attached if, when the slaves were ready to be taken on board, the ship had been blown out to sea and the voyage lost. In that and similar cases, "there was something of certainty in the profits or commissions which the assured expected:" but, "where not only the profits are an *expectation, but the obtaining a cargo, out of which the com- mission is to arise, is also an expectation, such an insurance cannot be supported without entirely destroying the intention of the stat. 19 G. 2, c. 37:" 2 Park Ins. 564. The present insurance, tried by this test, sustains the action. *Devaux v. J'Anson*, 5 New Ca. 519, goes the whole length required by the plaintiff below. [MAULE, J.—The goods there were the plaintiff's own; and the decision was that, under an insurance upon freight, he might recover the profits expected from carrying his own goods in his own ship: a very old point. PARKE, B.—It was an insurance of the ship's earnings.] The insurance was against loss by injury either to the ship or goods: if either, in such a case, received injury by which loss accrued, the safety of the other would be no answer. [CRESSWELL, J.—According to your argument, you do not want the second contract of sale, if you can show that a profit would, in some way, have been made by the goods.] There is nothing unreasonable or illegal in a contract to be indemnified against loss that may accrue, either by the goods being altogether prevented from going, or by a part being damaged so that a contract in respect of the whole cannot be fulfilled: and, if the claim arises, the only question is, whether the loss happened by a peril insured against. [PARKE,

B.—It is strange if the underwriters have insured the arrival by a certain day at the ordinary premium.] It is enough if the record shows that the voyage insured was never performed, and that by reason of a peril insured against. It lies upon the underwriters to prove that, *656] having insured *against a particular peril, and that having happened, they are not liable.

Then, the policy in this case has attached, the subject-matter of insurance being totally destroyed. The profit was an undivided profit, depending upon the arrival of all the rice. Part not arriving, the whole benefit was lost; and that by a peril insured against. According to *Lovatt v. Hamilton*, 5 M. & W. 639,† the plaintiff could not obtain 6000 bags, and he could not compel his vendees to accept less. [PARKE, B.—Do you say that the insured profit would have been lost if one bag had sustained sea-damage?] In such an extreme case a jury would not find for the plaintiff. But if there were a real and substantial loss of quantity the profit would be gone. [PARKE, B.—If the loss of ten bags would have that result, ought not the premium to be very high?] It was. [MAULE, J.—If you had shown the agent of the Company a contract such as you state this policy to be, he would not have taken it at 2½ per cent.] The question comes ultimately to be, what was insured. [PARKE, B.—And whether the policy has attached to that. MAULE, J.—By perils of the sea.]

Sir *F. Thesiger*, in reply.—There was, no doubt, some interest in the goods and possible profits, which might have been insured by a suitable policy. The insurance is simply of “profit on rice.” It is contended that this means the profit of certain contracts respecting rice; but that is not so. If the party insuring had stated to the underwriters that he wished to insure the arrival of 6000 bags of rice in London by the *657] *1st of May, the case would have been different. But the profit, as mentioned here, is part of the value of such a quantity of rice. [PARKE, B.—It is an additional insurance by the owner on his own property. MAULE, J.—Of the price at the port of discharge, after deducting the cost on board.] Such an insurance must be not on the profits in the abstract, but on profits annexed to something; that is, to some certain goods. Then the risk upon such profits “at and from Madras” must commence when such certain goods are laden on board at Madras. *Horneyer v. Lushington*, 15 East, 46, decides that this is the time at which the policy on goods must attach. The case of commission differs from this; for, if the ship is lost, the commission may still be earned by sending on the goods in some other way. It is true that, in the case of freight, the assured may recover if either the ship or the goods be lost, the freight depending on the existence of both. But here a term is introduced independent of the mere safety of either ship or goods; namely that the goods, and each and every part of them, shall arrive by such a time that profits may accrue under

a contract. [ALDERSON, B.—It is an insurance of the capacity to perform a contract.] Underwriters may enter into such an engagement; but they should have specific notice that they are doing so. Again, the present subject of insurance, as represented on the other side, is one on which perils of the sea, as the term is commonly understood, cannot operate. [ALDERSON, B.—Would a calm be a peril of the sea for this purpose?] The defendant in error must contend so. In the case of freight, a loss by destruction of the vessel is a total loss within the policy, though the goods *are not on board: but there the peril insured against is a peril to ship or goods; and the [*658 destruction of either takes away the possibility of earning freight. In this case of insurance on profits, the perils of the sea, if they operate at all, must operate upon the tangible subject goods, and goods actually on board. If the *Edward Bilton* had been totally lost before any rice was on board, but the rice had been sent by another ship, and had arrived in time and been accepted, there would have been no loss by perils of the sea, within the meaning of this insurance. The loss which has happened is not a loss by perils insured against, but by retardation of the voyage. No direct answer has been given to the question whether, if the voyage had been delayed one day beyond the end of May, or if one or two bags of rice only had been damaged, there would have been a loss within the meaning of the policy. This is, in effect, not an insurance upon profits in the sense ascribed to the word on the other side, but on the arrival of the ship in a given time, and the ability of the assured to perform his contract.

Willes (with *Martin*) suggested that the declaration expressly averred that the plaintiff "did make assurance upon the expected profit on the said rice," and the plea admitted this. [CRESSWELL, J.—There is no admission: the plea is the General issue, by Statute. PARKE, B.—It puts in issue everything.] Stat. 11 G. 1, c. 30, s. 43, gives the Company power to plead "that they have not broke the covenant;" but it does not give any specific operation to the plea. [PLATT, B.—Is not the effect of such an enactment, that the plea puts in issue everything?]

Cur. adv. vult.

*PARKE, B., now delivered the judgment of the Court.

This case was argued before my brothers ALDERSON, MAULE, [*659 ROLFE, CRESSWELL, PLATT, WILLIAMS, TALFOURD, and myself, at the last sittings. The action is on a policy of assurance of the Royal Exchange Assurance Company. The declaration is out of the usual form. It states that, before the making of the policy, the plaintiff had agreed to buy of Drouhet, Gardiner & Co. 6000 bags of rice, then supposed to have been shipped at Madras on board the *Edward Bilton*, to arrive on or before the end of May, and guarantied equal to samples, at 19s. a cwt., with other matters unnecessary to mention. It then states that the plaintiff agreed to sell the same 6000 bags, at 20s. 6d.

per cwt., on the like terms; and that the plaintiff had just reason to expect, by reason of the contracts and the arrival of the rice, to make a profit of 675*l.*, and thereupon caused the policy in question to be effected on the said profit on the said rice, which said policy is set out. It states (his Lordship here read the material parts, as set out in the declaration).

Upon the special verdict the Court of Queen's Bench gave its judgment in favour of the plaintiff. On the argument before us, it was contended that this judgment was erroneous. And we think it was.

The first question discussed was, whether the plaintiff had an insurable interest in profits on the rice. Under the circumstances stated in the special verdict, we feel no doubt that he had; he had entered into a binding contract with Drouhet & Co., by virtue of which he would have had a right to 6000 bags of rice delivered to him in England on the safe termination of the voyage of the *Edward Bilton* to England, *660] with the *whole of that quantity of rice on board, before the end of May; and he had made another contract to sell the rice in these events, by which contract he had secured a profit of 1*s.* 6*d.* a cwt. We have no doubt that the plaintiff might have recovered, in the events which have happened, a total loss, if he had been insured by a policy properly adapted to the case, and so drawn as to cover his special interest from the time that the rice was appropriated by the vendors, and ready to be shipped at Madras, and also to assure him against losses of the expected profits, not merely by the loss of all the rice by perils of the seas, but by the loss of any part of it, or the loss of the ship, or delay of the voyage beyond the month of May; in any of which contingencies this special interest in profits would have been entirely defeated.

If such an assurance had been made on this peculiar interest, against all these events, it is obvious that the underwriters would have required a much larger premium for insuring so complicated a risk than for an ordinary insurance by an owner on goods or profit on goods, which would be liable to loss only by perils of the seas or other accidents happening to the goods themselves.

But the question in this case arises on the policy declared upon, which is in most respects in the ordinary form, attaching the risk to the ship in the port and to the goods from the loading on board. And the decision of that question depends upon the true construction of the policy alone; the facts found by the special verdict not affording any ground for putting a different construction upon it than that which its words require. It is probable that the plaintiff meant to insure his *661] *special interest, which was defeasible altogether on the happening of any one of four contingencies, the loss of the ship, or of the whole of the rice, or of part of the rice, or the delay of the voyage; and to insure against all of these contingencies happening by perils of

the seas, or the other losses mentioned in the policy. Perhaps also he may have meant the policy to attach to goods on shore; but that is less probable, as he supposed the rice to be on board. The facts found do not enable us to say that the defendants meant to insure that interest, and against all those contingencies, if that circumstance would make any difference; for it is not found that they knew the nature of the interest at the time of the effecting of the policy. The true question is, what is the meaning of the words in the policy itself.

Upon the face of the policy, giving full effect to the written part of it, we think that the plaintiff is to be considered in the same situation, as to the liability, as if he had insured the ordinary profits of a parcel of rice shipped on board the particular vessel, that is, the additional value which it was expected to acquire at the termination of the voyage, and against the losses specified. If so, we think it clear that the policy attached only to such rice as was actually on board. The adventure begins on the said goods from and immediately after the loading on board: and we think the insurance on the profit or the additional value of the goods cannot begin at a different time; and, further, that the losses insured against by this policy are only the losses by perils of the seas directly affecting the goods and consequently the profit on the goods.

We do not mean to say that the special interest *which the plaintiff had was not a "profit on rice," nor that it was not in- [662
sured against certain risks by the policy in certain events. It is not necessary for the defendants to contend that there was a false description of the subject of the policy, so that the underwriters were not bound thereby to indemnify the plaintiff against some losses happening to it. We do not say the policy was void altogether, and the defendants not bound by it. Indeed we think the defendants must be taken to have insured those insurable profits in rice, which the plaintiff had, answering the description in the policy; and he is not stated to have had any other than that in question: but we are of opinion that, according to the terms of that policy, it attached only to profits arising from goods *actually put on board*, and indemnifies only against loss or damage to those goods, just as if ordinary profits of goods belonging to the owner of them had been insured thereby. The defendants, therefore, were not liable on the policy for the profit on rice not on board.

But it is not necessary for us to decide even this point; for, if the policy had attached to the profit of rice on shore, the defendants would certainly not have been liable for losses by perils of the seas, which did not *directly* affect them, but only other rice comprised in the same contract, the loss of which caused the loss of all the profit by reason of the special nature of that contract, which made the profit to depend on the safe arrival of the *whole* of the rice on board a *particular* vessel, and in

a *certain time*. Who could suppose under such a policy as this that the defendants were to pay a total loss if perils of the seas caused a loss *663] of the ship, or of any part of the rice, or a retardation of the *voyage? We think it clear that the defendants were not bound to indemnify against such events, entirely collateral to those on which ordinary profit on goods depends; so that, according to the true construction of the policy, it attached to the profit of no goods, nor has there been a loss of the profit of any goods by the perils insured against, except the 1200 sacks, which have been paid for by the money paid into Court. If indeed it attached to the profit of those on shore, there has been no loss of that profit by perils of the seas, but only a retardation of the voyage, for which the defendants are not responsible, unless on a policy specially providing for such an event.

Judgment reversed.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

WEEDON *v.* WOODBRIDGE. *Jan.* 22.

Reported, 13 Q. B. 470 (E. C. L. R. vol. 66).

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

GOSLING *v.* VELEY and Another. *Jan.* 22.

Reported, 12 Q. B. 328 (E. C. L. R. vol. 64).

*664] *IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

GREY and Others *v.* FRIAR. *Jan.* 22.

Reported, 15 Q. B. 901 (E. C. L. R. vol. 69).

GASKILL v. SKENE. Jan. 23.

Assumpsit for money had and received. Plea: Non assumpsit. Particular of demand, for "cash received by the defendant from D., being 10s. in the pound on a debt of 52l. 5s. at one time due from plaintiff to defendant, which had been previously paid by plaintiff to defendant." On the trial, a letter from D. to defendant was received in evidence. It stated that, through an oversight, 10s. in the pound had been paid to the defendant, though the debt of 52l. 5s. had been previously satisfied by the payment of 39l. 10s. and the deduction of discount, and it requested that defendant would return the amount. No answer was sent. Evidence was given as to the payment of 39l. 10s. The Judge, in summing up, said that the statements in the letter were no evidence of the truth of the matters therein stated, but that the jury might draw an inference from the defendant's silence on receiving such a demand. And he left it to the jury to say, on the whole evidence, whether the debt of 52l. 5s. was or was not discharged before the payment referred to by D. Verdict for plaintiff.

Held, on motion for a new trial, that the letter was properly received, being in substance a demand, and containing such statements only as might fairly accompany a demand: and that there was no misdirection, as the payment of a smaller sum, with discount, was a sufficient discharge of the larger debt to bear out the allegation in the particular.

ASSUMPSIT for money had and received. Pleas, except as to 16l. 12s., parcel, &c., Non assumpsit and Set-off; and as to 16l. 12s. payment into Court.

The plaintiff took the money out of Court; and issue was joined on the other pleas.

Particulars of demand.

"To cash received by the defendant of Mr. Dobie on the plaintiff's account, being 10s. in the pound on a debt of 52l. 5s. at one time due from the plaintiff to the defendant, which had been previously paid by the plaintiff to the defendant - - £26 2 6

To cash received by the defendant of Mr. Dobie on the plaintiff's account, being 10s. in the pound on account of a debt of 4l. 5s. 6d. due from the plaintiff to the defendant - - - - - 2 2 9

£28 5 3

And the plaintiff gives credit for such debt of - - 4 5 6

£23 19 9

On the trial before Lord DENMAN, C. J., at the sittings in Middlesex after Hilary term, 1849, it appeared that Mr. Dobie had been employed to compound with the plaintiff's creditors by paying each of them 10s. in the pound, and that he had paid defendant 26l. 2s. 6d., as 10s. in the pound on a debt of 52l. 5s. Subsequently Mr. Price, who was employed as accountant for the plaintiff's estate, wrote four letters to the defendant, to which he received no answer. The plaintiff's counsel, having called for these letters, which were not produced, offered secondary evidence of their contents. The defendant's counsel objected that they could not be evidence unless it were shown that the defendant in some

way acted upon them. The Lord Chief Justice received the evidence. The first letter was as follows.

“December 8, 1846.

“Mr. Dobie has handed me your letter of the 26 May last, acknowledging the receipt of check for 26*l.* 2*s.* 6*d.*, being 10*s.* in the pound on your former account of 52*l.* 5*s.* 0*d.* against Mr. Gaskill, and also enclosing *another account for 4*l.* 5*s.* 6*d.*, which latter claim not being *666] included in my list of liabilities, he requested me, as accountant to the estate, to examine and arrange with you. I find this latter account correct in every respect; but, with regard to the former account, have just discovered that, through an oversight, it was sent to Mr. Dobie as being unpaid, although I now find it was settled by Mr. Gaskill himself in October last year in full by a check for 39*l.* 10*s.* which was never returned to Mr. G.’s clerk in the cash account, and was not consequently posted to your debit in the ledger, and therefore included in the list of creditors; you will be good enough therefore to look to your cash account of that date (October 1845), where you will find my statements correct, and I shall be happy to hear from you on the subject per return; and, if you will oblige me with the name of your London agent, I shall be happy to wait on him with the receipts for both payments; and we can then come to an arrangement as to the account for the 4*l.* 5*s.* 6*d.*”

The other letters referred to this, and complained that no answer was given.

There was also evidence of a conversation with the defendant, in which he acknowledged that he had received the check for 39*l.* 10*s.*, but said he had agreed to take off only 5 per cent. discount from the 52*l.* 5*s.*, and had received the check on account of the balance, and not in discharge of the whole. A receipt for 47*l.* signed by the defendant was put in; but the sum of 47*l.* was written on an erasure; and it was not satisfactorily explained, on any hypothesis, how that sum was come to.

The Lord Chief Justice, in summing up, told the *jury that *667] the letters were not evidence of the truth of the statements contained in them, but that the silence of the defendant after receiving such letters was a fact from which they might draw an inference. He left it to the jury to find for the plaintiff or defendant, according as they thought that the debt of 52*l.* 5*s.* had or had not been discharged before the payment by Mr. Dobie. Verdict for plaintiff. *O’Malley*, in the ensuing term, obtained a rule nisi for a new trial on the grounds of the improper reception of evidence, and of misdirection.

M. Chambers and *Pigott* now showed cause.—The letters were properly received. In all cases where a statement either verbal or written is made to a party, it is evidence as explanatory of his conduct: if he does not contradict the statement, his silence is certainly not equivalent to an admission that the statement is true, and in many instances

the inference against him arising from such silence is of no weight; but in such an instance as the present it is strong. This letter was not an officious communication, but a statement of facts within the defendant's knowledge, coupled with a demand on the defendant which, if the facts were true, the writer was entitled to make. No fair-dealing man in the defendant's position would have refrained from explaining the mistake of the writer, if there was one; and the jury might properly draw an inference from his not doing so. But it is sufficient to say that there are possible cases in which silence after a demand affords an inference against the party who is silent; for, if there is any such instance, the evidence is admissible, subject to observation on *its weight [*668 in the particular case. As to the misdirection, the point made at the trial was that there could not be a payment of a larger sum by a smaller; no doubt this is technically true: but, unless it is to be received as law that no agreement to take off discount can ever be binding, it must be a question for the jury whether the parties did agree to take off discount, be it large or small.

O'Malley and Spinks, contrà.—First: the letters were not admissible. When a party sends an answer to a letter, or after receiving it acts in a particular way, the letter may be evidence to explain the answer or the conduct; but it cannot be given in evidence without the answer; *Richards v. Frankum*, 9 Car. & P. 221 (E. C. L. R. vol. 38); and the same point was ruled by *PATTERSON, J.*, at the Ipswich Assizes, in an unreported case. If he does nothing, there is nothing to explain, and the letters are not evidence; *Fairlie v. Denton*, 3 Car. & P. 103.(a) If notice was a part of the plaintiff's case, such part of the letter as amounted to notice might be evidence, but not the rest. But it was no part of the plaintiff's case that notice was given. It would be very mischievous if a plaintiff were permitted to prove his case by showing that he stated it in a letter sent to the defendant, and that the defendant did nothing. Secondly: there was a misdirection. The particulars show conclusively, as against the plaintiff, that the debt was once due, and was 52*l.* 5*s.* That could not be satisfied by the payment of a smaller sum, 39*l.* 10*s.* The defendant might, the day after he received that sum, have *sued for the balance of 12*l.* 15*s.*, and the plaintiff would have had no defence; *Fitch v. Sutton*, 5 East, 280; [*669 1 Smith's Lead. Ca. 147 (3d ed.), note to *Cumber v. Wane*, 1 Stra. 426. There was no evidence in the present case that the amount was in dispute, or unliquidated: and the Judge ought to have told the jury that, even if the parties agreed to deduct the large discount, the balance of 19*l.* 16*s.* remained due from the plaintiff to the defendant; and consequently that the plaintiff was not entitled to recover the whole sum.

PATTERSON, J.—I think that the rule should be discharged. It is scarcely possible to make a demand without stating the circumstances

under which it arose. Taking that into consideration, the letters here seem to me to amount to little more than a demand; and, if a letter making a demand on the defendant would be admissible in evidence without proof of his acting on it, these letters are admissible. In *Fairlie v. Denton*, a distinction was taken between that portion of the letter which amounted to a demand and the rest, Lord TENTERDEN admitting that part to be read. We do not therefore touch upon any decided case or set any bad precedent by saying that these letters, amounting to a demand on the defendant, were properly received in evidence against him. I do not think either that there was any misdirection. The Lord Chief Justice told the jury that, if they thought the parties had agreed to deduct the larger discount, the plaintiff was *670] entitled to recover the whole *sum afterwards paid to the defendant. The jury took the plaintiff's view of the case; and we are not now inquiring whether their verdict was against evidence or not. I think it would be going too far to say that the form of the particulars made it incumbent on the plaintiff to prove that there had been a payment in cash of 52*l.* 5*s.* 0*d.* All that he had to show was the amount on which 10*s.* in the pound was paid to the defendant, and that the original debt was satisfied, either by payment in cash in full, or by a cash payment after discount was allowed. This he did prove; the defendant could not have been misled by the form of the particulars.

COLERIDGE, J.—I am of the same opinion. The rule in *Cumber v. Wane* is not applicable to such a case as this. It is not in question here whether the payment of the debt after deducting discount could properly be pleaded as payment. The form of the pleadings leaves it open to show a discharge in any way. As to the other point, I agree with the defendant's counsel that there may be a mischievous attempt to manufacture evidence by making a tricky statement of the party's case, and then offering it in evidence as having been served on the other party as a demand. I hope that, whenever such an unworthy attempt is made, the judge will take care to baffle it, either, when practicable, by striking out the improper statement, or, where that cannot be done, by cautioning the jury and making to them proper comments on the *671] course pursued. But surely, when such letters as these were *sent to the defendant, his silence was evidence from which the jury might reasonably draw an inference.

ERLE, J.—I also think the letters admissible. To make an intelligible demand, some statement of the facts on which the demand arises must be made. These letters do not go farther than was fair for that purpose. I also think there was no misdirection. It is true that, in pleading, a lesser sum cannot be treated as payment of a greater. But particulars of demand are to be construed, not as pleadings, but in the sense which the words bear in ordinary use. Now every one knows from his own private experience, and we judicially learn in the course

of the trials before us, that a larger debt may, by a customary trade allowance, or by deducting discount or otherwise, be discharged by the payment of a smaller sum, and that in common language the account would then be said to be paid. It is in that sense that the particulars must be understood: and, that being so, the Lord Chief Justice left the proper question to the jury.

Rule discharged.(a)

(a) Reported by C. Blackburn, Esq.

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THE WATERFORD, WEXFORD, WICKLOW, and DUBLIN Railway Company v. LOGAN. Jan. 31. [*672]

Debt by a Railway Company against defendant, alleged to have been the holder of shares, for calls alleged to have been "duly made."

Motion for leave to plead: 1. Never indebted. 2. Defendant not holder of shares. 3. That defendant was put on the register by fraud of the plaintiffs.

4. That defendant was mentioned in the plaintiffs' special Act as *having subscribed* to the undertaking; that by such subscription he became holder of the shares: and that he was induced to subscribe by fraud of the plaintiffs.

6. That the calls were made for fraudulent purposes, known to plaintiffs, and the making of them was a fraud on defendant.

7. (Retained by defendant on being put to his election between this and two similar pleas, 5 and 11.) That, before passing of the special act and formation of a register, and before the making of calls, defendant, an original subscriber, sold his scrip and interest, and the Company agreed with the vendee to register him for the shares, and that he should be the shareholder; but that they afterwards registered defendant for the shares against his will and that of the vendee; and that defendant never was the shareholder except as in this plea aforesaid.

8. Agreement between plaintiffs and defendant that the calls should be rescinded.

9. That the plaintiffs' Act was obtained by fraud of the plaintiffs and others.

10. Traverse of the calls being duly made as alleged in the declaration.

12. That, when the calls were made, capital had not been *bonâ fide* subscribed to a certain amount required by the special Act, but part of such subscription had been fraudulently obtained by plaintiffs; that there were no subscriptions to the said amount; and that until such subscriptions were made, plaintiffs had no power to make calls.

13. That notice of the calls was not duly given.

Pleas 1 and 2 were allowed.

Plea 3 was disallowed, as a plea to evidence, namely the anticipated evidence of the Register.

4. Disallowed as an inconsistent and bad plea.

6. Allowed.

7. Disallowed as an argumentative traverse of being shareholder.

8. Allowed.

9. Disallowed, as suggesting an inadmissible defence.

10. Disallowed, on the word "duly" being struck out of the declaration.

12. Allowed, as raising a fairly disputable question on the special Act and on the Companies and Lands Consolidation Acts, 1845.

13. Disallowed, the defence being provable under *Nunquam indebitatus*.

DEBT. The declaration stated that defendant was and is the holder of divers, to wit, twenty, shares in the said Company, and was and is indebted to them in a large, &c., viz. 30*l.*, in respect of a call of a certain sum, viz. 10*s.*, upon each of the said shares, theretofore, viz. on 20th February, 1847, duly made by the said Company, and for and in respect of, &c. (another call, of 1*l.* per share, duly made on 22d De-

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*673] cember, 1847); by *reason of which sum of 30*l.* being unpaid, an action hath accrued to the said Company by virtue of stat. 8 & 9 Vict. c. 16 (The Companies Clauses Consolidation Act, 1845), and of an act, &c., 9 & 10 Vict. c. ccviii., (a) local and personal public, to demand from defendant, &c.

Defendant took out at a summons to show cause why he should not be at liberty to plead the several matters specified in the following abstract.

1. Never indebted.

2. Traverse of defendant being the holder of shares, &c.

3. That defendant was put and placed on the register of shareholders of the Company, and was registered as a shareholder, by fraud of plaintiffs and others.

4. That defendant is one of the persons mentioned in plaintiffs' first act, 1846, (b) as having subscribed to the undertaking, by virtue of which subscription he became holder of the shares; that he was induced to so subscribe by the fraud of plaintiffs and others.

5. That defendant is one of the persons mentioned in the said act as having subscribed to the undertaking: that defendant did so subscribe; by virtue of which subscription he became holder of shares as alleged in *674] the declaration: that, after the passing of plaintiffs' said act, and before any meeting of directors or of shareholders was held, &c., and before the making of the said calls, and before making, &c., of any register of shareholders under the statute, defendant agreed to assign, transfer, &c., and did transfer and deliver, &c., the said shares, and all defendant's interest therein and in the said Company, &c.; and the scrips, receipts, &c., were then delivered to the transferee: and that plaintiffs and the transferee agreed, with consent of defendant, that the transferee should be the holder, &c., of the said shares instead of defendant, and that the transferee should be accepted and registered as holder of said shares: That defendant was afterwards registered against his will and against the will of the transferee; and that defendant was never the holder of said shares save as in this plea aforesaid.

6. That the calls were fraudulently made by plaintiffs for certain fraudulent and illegal purposes, &c., to the plaintiffs well known; and that the making of such calls was a fraud on the defendant.

(a) "For making a railway and branch railway, to be called 'The Waterford, Wexford, Wicklow, and Dublin Railway.'" Sect. 1 expressly incorporates the Companies, Lands and Railways Clauses Consolidation Acts, 1845. An Act (referred to in the text, p. 676, post), 10 & 11 Vict. c. lxi., local and personal public, was passed in the following session of Parliament, "To authorize certain alterations of the line of the Waterford, Wexford, and Wicklow Railway, and to amend the Act relating thereto."

(b) Stat. 9 & 10 Vict. c. ccviii., s. 3, which enacted that certain persons named, and all other persons and corporations who have already subscribed or shall hereafter subscribe to the undertaking, and their executors, &c., respectively, shall be united into a company, &c., and incorporated, &c. By sect. 4, the Company's capital was to be 2,000,000*l.* Sect. 6 regulated the making of calls.

7. That, before the passing of plaintiffs' first act, 1846, and before any register of shareholders, &c., was formed, &c., and before making of the calls, &c., defendant, being an original subscriber, agreed to sell, and sold, &c., his scrip and interest in the plaintiffs' Company to a person whose name is to him unknown, and delivered the scrip to the purchaser. That the vendee applied to the plaintiffs to be registered as a shareholder; and that the Company and vendee agreed to register him, and that the vendee should be the holder of the said shares and be registered in respect thereof, &c. That the Company afterwards registered defendant's *name for said shares and interest against his will and against the will of the vendee; and that defendant never [*675 was the holder of the said shares except as in this plea aforesaid.

8. That, after the accruing of the causes of action in the declaration mentioned, it was agreed between plaintiffs and defendant and others that the calls should be rescinded, &c., and that defendant should not be called upon to pay the said calls: that such agreement was accepted in satisfaction of said causes of action.

9. That the plaintiffs' first act of parliament, first mentioned in the declaration, was obtained by fraud, &c., of plaintiffs and others.

10. Traverse of calls being duly made as alleged in the declaration.

11. That defendant is one of the persons mentioned in plaintiffs' first act as having subscribed, &c.: that he became holder of the said shares as mentioned in the declaration: that, before the passing of said act, and before the making of calls, defendant sold the said shares, and the scrip after mentioned, and all his interest under such contract; and the said scrip receipts, &c., were then delivered over to said vendee (such scrip having been given to defendant by plaintiffs as representing his share and interest in plaintiffs' undertaking): that the vendee, after the passing of the said first act, and before the making of the calls, &c., applied to plaintiffs to register him as holder of the said shares: that plaintiffs refused to do so, and, against the wish of the vendee and the defendant, and before the making of the calls, registered defendant as the holder of the shares: and that defendant was not holder of shares except as in this plea aforesaid.

*12. That, at the times, &c., of making of the calls, the capital of the plaintiffs, required by the first Act mentioned in the declaration, (a) and by a second Act relating to plaintiffs' Company (1847), (b) to the extent of 1,500,000*l.*, had not been bonâ fide subscribed for as required by the said Acts, &c., but that a great portion

(a) 8 & 9 Vict. c. 16, is the first act mentioned; but stat. 9 & 10 Vict. c. cxxviii., seems to be intended.

(b) Stat. 10 & 11 Vict. c. lxi., s. 22, referred to the Lands Clauses Consolidation Act, 1845, and enacted that, when and so soon as 1,500,000*l.* should have been subscribed, and the subscription thereof certified in manner required by the Act of 1845 as to subscription of the whole capital, it should be lawful for the Company to put in force all the powers of the Act authorizing the construction of the railway, as to that portion which is situate between the Dublin and Kingstown railway and the town of Wexford.

of such subscription was fraudulently obtained by the plaintiffs: that there were no subscriptions to the amount aforesaid at the times of making of the calls, &c.; and that plaintiffs had no power to make calls until such subscription was made.

13. That no notice of calls was duly given.

On the hearing of the summons, ERLE, J., allowed the 1st, 2d, 8th, and 13th pleas, and disallowed the rest.

Prentice, in this term, (a) moved that the order of ERLE, J., might be rescinded as to the disallowance, and all the pleas allowed. It appeared, on affidavit in support of the motion, that shareholders in default, to the amount of 80,000*l.*, had disputed the legality of the calls and refused to pay them; that actions in which the legality of the calls was disputed had been brought in the Court of Exchequer, and consolidated; *677] and that this was stated to ERLE, J., who disallowed *the pleas (except as above stated), observing that, by this course, he should give an opportunity for bringing the question of their validity before the full Court. The affidavit also stated that the pleas as to the register of shareholders were disallowed by his Lordship as being pleas to evidence, and because the same questions were opened under the 1st and 2d pleas allowed: that the pleas as to the transfers were disallowed, because the defences would be open under the 1st and 2d pleas: that the pleas as to fraud were disallowed, because, if the fraud could be set up, the other pleas gave the opportunity: that the 10th plea was disallowed "as being open under the 1st and 2d pleas:" (b) and that the 12th plea was disallowed as not having reasonable grounds, and in exercise of the discretion of the Judge under the statute of Anne. (c) There was an affidavit of merits.

Prentice contended, as to the 3d plea, that, although it might seem to be a plea only to evidence, which evidence was the register, the substance was that defendant's name was on the register by fraud. It is true that, under stat. 8 & 9 Vict. c. 16, sects. 8, 28, the register is *prima facie* evidence that the party named is a shareholder: but he may be wrongfully there, after a transfer of his share, the Company refusing to register the transferee, and thereby keeping the transferor liable to calls, as the plaintiff was in *Sayles v. Blane*, *antè*, p. 205. [PATTERSON, J.—The defence is, not that the defendant was fraudulently *678] registered, but *that the plaintiffs fraudulently refused to register another person. COLERIDGE, J.—The allegation of being "registered" as a shareholder implies the act of registration itself. ERLE, J.—I thought that, if the name was on the register by fraud, the mere fact of its being there was not more than *prima facie* evidence, (d) and the defence would be let in by the plea that defendant

(a) January 17th. Before PATTERSON, COLERIDGE, and ERLE, Js.

(b) So in the affidavit.

(c) 4 Ann. c. 16, s. 4.

(d) See *West Cornwall Railway Co. v. Mowatt*, 15 Q. B. 521 (E. C. L. R. vol. 69).

was not a shareholder. COLERIDGE, J.—You are charged by the declaration as being the holder of divers shares; and you traverse that.] Under stat. 8 & 9 Vict. c. 16, s. 8, a party, to be deemed a shareholder, and so liable to calls, must be both a holder of shares and registered. The defendant here both denies being holder, and contends that he is on the register by fraud; and fraud must be specially pleaded. The defence raised by plea 4 is that the defendant was deceived into subscribing. The plea is like that of infancy, which has been several times discussed in actions for calls,^(a) and may, with proper averments, be a defence. [COLERIDGE, J.—Supposing you prove a fraud of individuals, A., B., and C., before the formation of the Company, how is that a fraud of the Company?] It is the fraud of the promoters; and the Company cannot disclaim their proceeding; *Edwards v. Grand Junction Railway Company*, 7 Sim. 337, 1 Mylne & Cr. 650. Plea 5 is not a mere denial of being holder, and ought to be allowed. A person not on the register may be a shareholder for the purpose of holding scrip, yet not for the purpose of being liable to *calls; *Newry and Enniskillen Railway Company v. Edmunds*, 2 Exch. 118.† This [*679] plea shows that the defendant was placed in the condition of liability contrary to agreement. A like argument applies to pleas 7 and 11. Plea 6 is not that the Company will apply the produce of the calls to illegal purposes, but that the calls were expressly made for such purposes: it therefore raises a legitimate question. To plea 9 the objection is that an act of parliament cannot be supposed to have been obtained fraudulently. But acts like the present have often been looked upon in the light of private contracts; and it is laid down generally in 7 Bac. Abr. 436, 437 (7th ed.), tit. *Statute* (A), that a statute may be void as being against common right or reason, or natural equity. As to plea 10: the declaration states that the calls were duly made; and the term “duly” being so indefinitely used, the defendant could not safely omit traversing the averment. Plea 12 raises a *bonâ fide* question, whether stat. 10 & 11 Vict. c. lxi. s. 22, restrains the making of calls, or only the laying down of the railway. *Cur. adv. vult.*

PATTESON, J., on a subsequent day of the term (January 26th), said: The third plea, we think, ought not to be allowed, because it is in truth nothing more than an assumption that the plaintiffs will attempt to prove that the defendant is a shareholder by the production of the register: it is by anticipation showing that the register is not conclusive; which is nothing more than pleading to the evidence. The [*680] 4th plea, *we think, is inconsistent in itself; because it shows on the face of it that the defendant had subscribed to the undertaking before the act of Parliament incorporating the Company had passed;

(a) See *Cork and Bandon Railway Company v. Cazenove*, 10 Q. B. 935 (E. C. L. R. vol. 59); *Newry and Enniskillen Railway v. Coombe*, 3 Exch. 565;† *Birkenhead, Lancashire, and Cheshire Junction Railway Company v. Pilcher*, 5 Exch. 24;† *Dublin and Wicklow Railway Company v. Black*, 8 Exch. 181.†

yet it goes on to say that he became a subscriber to the Company by the fraud of the plaintiffs: therefore it alleges that he became a subscriber by the fraud of the Company, which did not exist at the time when he subscribed. That plea, therefore, cannot be allowed. The 5th, 7th, and 11th pleas seem to be the same plea in different forms: therefore the defendant must elect to take one of those pleas. With respect to the 6th plea: the abstract, which is very short, only says that the calls were made fraudulently by the plaintiffs for certain fraudulent and illegal purposes to the plaintiffs well known. I do not know whether it is meant to state by the plea in extenso what those fraudulent purposes were, or merely to say, some fraudulent purposes to the plaintiffs well known. If it is meant to set out what the fraudulent purposes were, we think there may be a rule to show why the plea may not be allowed, but not in those general terms. The 9th plea, that the Act was obtained by the fraud of the plaintiffs, we think cannot be allowed. The 10th seems to be a traverse of the calls being duly made. I have not seen the declaration; but we have learnt from my brother ERLE that that traverse was on account of the word "duly" being in the declaration. It was supposed that some particular effect was to be given to the word "duly:" and therefore we think there may be a rule in respect of the 10th plea, unless the plaintiffs will strike the word "duly" out of the declaration. On the 12th plea the defendant may have a rule. The 13th plea is that there was no notice of the calls; and *681] *I believe it has been decided over and over that that may be given in evidence under *Numquam indebitatus*; that plea, therefore, cannot be allowed.

Rule to show cause why defendant should not be at liberty to plead pleas 6, 7, 10, and 12.

Butt and Peacock, in the same term (January 31st), showed cause.—As to plea 6: in *London and Brighton Railway Company v. Wilson*, 6 New Ca. 135, a plea, "that the calls were made for other purposes than those warranted by the Act," was held inadmissible. The *South Eastern Railway Company v. Hebblewhite*, 12 A. & E. 497 (E. C. L. R. vol. 40), is to the same effect. The Company stand in the situation of trustees; and the plea imports a charge against them which cannot be made in a Court of law. The defence under plea 7 is, virtually, that the defendant is not a shareholder *de jure*; and that may be proved under the first two pleas; *Shropshire Union Railway and Canal Company v. Anderson*, 3 Exch. 401,† *Birkenhead, Lancashire, and Cheshire Junction Railway Company v. Brownrigg*, 4 Exch. 426.†(a) The plea is an argumentative denial of the defendant's holding. As to plea 10, the plaintiffs are content to strike the word "duly" out of the declaration. As to plea 12, the reference there to the Companies Clauses Consolidation Act is erroneous. The exercise of power contemplated

(a) *Butt* also referred to stat. 8 & 9 Vict. c. 16, ss. 21, 26, 27.

by stat. 10 & 11 Vict. c. lxi. s. 22, (a) after subscription of a certain capital, is not the making calls, but *the compulsory taking of land under sect. 16 of The Lands Clauses Act, 1845, 8 & 9 Vict. c. 18, which is embodied in the special act. [COLERIDGE, J.—By the special act, after the required subscription, the Company may exercise “all” the powers of the Act 9 & 10 Vict. c. ccviii. One of those is making calls.] Nothing prevented their making calls, independently of stat. 10 & 11 Vict. c. lxi. (b) The plea imputes fraud; but *Mangles v. Grand Collier Dock Company*, 10 Sim. 519, shows that such an averment, qualified as it is here, would be no answer.

Cockburn and Prentice, contra.—As to plea 6. The plea in *London & Brighton Railway Company v. Wilson* suggested only that the directors of the Company were exceeding the powers given them by the special Act, a deviation which the shareholders might call in question among themselves: but here the charge is that the plaintiffs are making calls in order to effect a fraud and carry out an illegal purpose: that they are proceeding under their Act ostensibly, but not really. [COLERIDGE, J.—Is not that within the reasoning of TINDAL, C. J., in the case you refer to? (His Lordship referred to the passage beginning “Who can show,” and ending “directed by the statute.”)] The observations must be taken with reference to the facts of that case. [WIGHTMAN, J.—If there is an actual debt, it is going far to say that the Company cannot *make a call because they intend devoting the money to an illegal purpose.] Suppose the directors intended to divide it among themselves and abscond. [WIGHTMAN, J.—Is there any authority to show that that would be an answer?] Other suppositions may be made; as, that some of the shareholders were paupers, and the call was made for the purpose of being enforced nominally against all, but really against the solvent ones only. Or that the directors had constructed a mile or two of railway, and made a call, not intending to construct the remainder, but to misappropriate the money. There is no authority to show that a plea of fraud generally, is not good. The defence in plea 7 is not included in the traverse of being shareholder. It admits that the defendant is so in one sense, but denies the liability which circumstances may appear to cast upon him in that character, alleging that he sold his interest before the formation of a register; that the Company agreed to register the vendee, and that the defendant was registered in violation of that agreement; that the same person was not entitled to the shares and registered as proprietor. The position of the defendant here is the same as that of the defendant in *Midland Great Western Railway Company*

(a) See p. 676, note (b) ante.

(b) The Court not having given any decision as to the validity of plea 12, a more particular notice of the enactments referred to in this part of the argument is thought unnecessary. A similar plea was held bad in *Waterford, Wexford, Wicklow and Dublin Railway Company v. Dalbais*, 6 Exch. 443.†

(Ireland) v. Gordon, 16 M. & W. 804:† but the point now made was not discussed there. [WIGHTMAN, J.—The pleas there were *Nunquam indebted*, and That defendant was not a shareholder. The second plea here makes it incumbent on the plaintiffs to prove the defendant such a shareholder as would be liable.] As to plea 12, stat. 10 & 11 Vict. c. lxi. s. *684] 22, there referred to, enables the Company, on *subscription of the required capital, to put in force all the “powers of the Act authorizing the construction of the railway:” among the powers is that of making calls.

PATTESON, J.—We think that you may retain plea 6, as that conveys a distinct allegation of fraud, and is not within the cases which have gone upon the mere averment that Companies were exceeding their jurisdiction. You may also plead the 12th plea, as it involves the construction of the statutes, in which there seems to be some difficulty. Plea 7 appears to us an argumentative traverse, and will not be allowed.

COLERIDGE and WIGHTMAN, Js., concurred.

Rule absolute for pleading the 6th and 12th pleas in addition to those already allowed, and striking out the word “duly” from the declaration.

(a) See *Waterford, Wexford, Wicklow, and Dublin Railway Company v. Pidcock*, 8 Exch. 279.†

The QUEEN v. The Justices of SURREY. Jan. 31.

The rule acted upon by the Court under stat. 1 W. 4, c. 21, s. 6, is, that, where an application for a mandamus is made and opposed, the unsuccessful party pay his costs, except under very peculiar circumstances.

And it was held not to be an excepted case, where the Sessions, in conformity with their own practice established for many years, had refused to hear an appeal because notice was not given of the entry and respite, and this Court had granted a mandamus to enter continuances and hear, and on such hearing the respondents had succeeded, without dispute on the merits.

AN appeal against an order of removal (from the parish of Lambeth in Surrey, to the parish of St. James, Clerkenwell, in Middlesex) having been entered and respited at the Michaelmas Surrey sessions, 1849, came on for hearing at the ensuing January sessions, when it was objected that the respondents had not had notice of the entry and respite.

*685] It had been *the practice of these Sessions for more than sixteen years to require such notice. The Justices allowed the objection and dismissed the appeal. A rule nisi was thereupon obtained for a mandamus to the justices to enter continuances and hear. The respondents showed cause; and ERLE, J., in the Bail Court, made the rule absolute, holding that the Sessions had no right to impose the condition insisted upon. (a) The Sessions, in obedience to the writ, heard the

(a) *Regina v. Justices of Surrey*, 6 Dowl. & L. 735. Easter term, 1849.

appeal; and the order of removal was confirmed. A rule nisi was then obtained for costs of the mandamus, under stat. 1 W. 4, c. 21, s. 6. Affidavit was made in opposition to the rule, stating the long continuance of the practice relied upon at the Sessions; that the grounds of appeal originally delivered raised various questions, of merits and form, other than that discussed in the Bail Court; that additional grounds were served after the rule for a mandamus had been made absolute; that, on the ultimate hearing of the appeal, the merits of the settlement were established in proof by the respondents, and not disputed on the other side; and that the respondents had only recovered on the appeal, for costs 40s., the usual nominal costs allowed by the Sessions. Their actual costs "in the said appeal and in this matter" had amounted to 53l.

Otter now showed cause.—The practice now established is, that "the party who succeeds in the Court below, upon an objection which turns out to be ill founded, and resists an application for a mandamus to correct the error, by showing cause against it, shall be subject to the application of the general rule for *the payment of the costs by [686 the unsuccessful party; subject to exceptions which the Court may make in particular cases in the exercise of their general jurisdiction over the costs;" per WIGHTMAN, J., in *Regina v. Justices of Cumberland* and *Regina v. Justices of Lancashire*, 5 Dowl. & L. 480.(a) The present should be deemed an excepted case. The respondents, who failed in this Court, had not mistaken the general law, as was done in some of the cases discussed before WIGHTMAN, J., but had been misled by the erroneous practice of the Sessions. And counsel here could not avoid calling the attention of the Justices to their own rules. In *Regina v. The Justices of the West Riding* (*Sheffield v. Crich*, 5 Q. B. 1, 10 (E. C. L. R. vol. 48)), where the error had arisen from wrong practice of the Justices or their Clerk, this Court refused costs of the mandamus. [WIGHTMAN, J.—The general rule seems to be the convenient one; that the party who has taken a point, and maintained it, gets the costs.] The question here was difficult; and judgment was reserved: in such cases costs of mandamus have been refused; *Rex v. The Lord of the Manor of Oundle*, 1 A. & E. 283, 299, note (c) (E. C. L. R. vol. 28); *Rex v. The Commissioners of the Thames and Isis Navigation*, 5 A. & E. 804 (E. C. L. R. vol. 31).

Pashley, contra.—*Regina v. The Justices of the West Riding* has been followed by many cases, particularly *Regina v. Justices of Cumberland* and *Regina v. Justices of Lancashire*, in which a different practice has prevailed. (He was then stopped by the Court.)

PATTERSON, J.—It is best to adhere to the broad rule, that, where a

(a) See *Regina v. Mayor, &c., of Newbury*, 1 Q. B. 751, 762 (E. C. L. R. vol. 41); *Regina v. Justices of Surrey*, 9 Q. B. 37 (E. C. L. R. vol. 58).

*687] mandamus is applied for and granted, the *party who fails in this Court must pay costs, unless under very peculiar circumstances. We must consider the point settled by *Regina v. Justices of Cumberland* and *Regina v. Justices of Lancashire*.

COLERIDGE and WIGHTMAN, Js., concurred.

Rule absolute.

The QUEEN v. RIGBY and Others.

The Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, s. 49, enacts that, when a railway is carried over a "turnpike road" by a bridge, the width of the arch shall be such as to leave thereunder a clear space of not less than 35 feet: other dimensions are given in the cases of a "public carriage road" and a "private road." Sect. 51 provides that, wherever the average available width, for the passage of carriages, of any existing roads, is less than the width hereinbefore prescribed for bridges over the railway, the width of such bridges need not be greater than such average available width; but so, nevertheless, that such bridges be not of less width in the case of a turnpike or public carriage road than 20 feet: and that, if such average available width shall be at any time increased beyond the width of such bridge, the Railway Company shall be bound to widen the bridge to such extent as they may be required by the trustees or surveyors of the road, not exceeding the width of the road as so widened, or the maximum width herein or in the special Act prescribed for a bridge in like case over the railway.

The effect of the last clause is, that, if the average available width for the passage of carriages on any road is more than 35 feet, the road may be narrowed to 35 feet under the arch; where it is less, the arch may be made of the same width as the road, so that it be not less than 20 feet wide: if the road be afterwards widened, the arch must be widened in proportion, up to, but not beyond, 35 feet.

In this reckoning, footpaths are not to be taken into account. Therefore, where the road, including footpaths, was 43 feet wide, but without them only 28, and the railway arch, 35 feet in width, stood partly upon and narrowing the footpath, but left the carriage way of its original width: Held, on indictment for obstructing the carriage way, that stat. 8 & 9 Vict. c. 20 (ss. 49, 51), and a railway act incorporating it, were complied with.

Although the special Act provided that, wherever the railway crossed the road otherwise than at right angles, the bridge should be made with a skew arch (which had been done in this instance), "so as not in any manner to alter the direction of or interfere with the line of the said roads, or the footpaths to the same."

INDICTMENT (removed into this Court by certiorari) for nuisance by obstructing a public highway, described in all the counts as a carriage-way, without mention of a right, or obstruction, of passage on foot. Plea: Not guilty. The prosecutors were "The Trustees of the Bermondsey, Rotherhithe, and *Deptford Roads." On the trial, *688] before Lord DENMAN, C. J., at the Maidstone Spring assizes, 1848, a verdict of Guilty was found, subject to the opinion of this Court on a case, the material parts of which are as follows.

By stat. 6 & 7 Vict. c. cviii., local and personal, public, "for more effectually repairing certain roads in the parishes of Bermondsey," &c., and for making several new roads," &c., certain persons were appointed trustees to carry the act into effect, under the name of "The Trustees," &c. (as above). By sect. 8, certain roads are described, for the improving,

maintaining, and keeping in repair of which it is enacted that the said Act shall be put in execution.(a)

By stat. 8 & 9 Vict. c. 20 (The Railways Clauses *Consolidation Act, 1845), it is enacted: The case then set out the enactment of sect. 1, incorporating this Act with all future railway Acts: the interpretations, in sects. 2, 3, of the words "The Special Act," "The undertaking," "The Company" and "The Railway:" the enactments of sect. 16, that, "subject to the provisions and restrictions in this and the special act, and any act incorporated therewith, it shall be lawful for the Company, for the purpose of constructing the railway, or the accommodation works connected therewith hereinafter mentioned, to" "make or construct in, upon, across, under, or over any lands, or any streets," "roads, railroads," &c., "within the lands described in the said plans, or mentioned in the said books of reference or any correction thereof, such temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings, and fences as they think proper:" and that "They may do all other acts necessary for making, maintaining, altering, or repairing, and using the railway." The case also referred to, and in part set out, sects. 46 and 49, as to the crossing of roads and construction of bridges.(b)

(a) The following clauses of stat. 6 & 7 Vict. c. cviii., were also referred to in the argument for the Crown.

Sect. 59. "And whereas it was provided by the said recited Act" (4 G. 4. c. lxxxiv., local and personal, public, 'for more effectually repairing,' &c., 'certain roads in the several parishes of St. Mary Magdalen Bermondsey,' &c., in Surrey and Kent), "and in the act therein recited, that no building should be erected by any proprietor or occupier of the lands adjacent to the roads thereby directed to be made and repaired, or other person, within 10 feet on either side of the said roads where the same are of the width of 40 feet or upwards, and within 30 feet from the centre of the said roads where the same are of less width than 40 feet, and if any such building should be thereafter erected contrary to the true intent and meaning of the said act the same should be deemed a common nuisance; be it therefore enacted, that no erection or building shall be erected by any proprietor or occupier of lands adjacent to the said roads or any of them, or by any other person, within the distance of 10 feet on either side of the said roads where the same are of the width of 40 feet or upwards, and within 30 feet from the centre of the said roads where the same are of less width than 40 feet, and if any such erection or building shall be hereafter erected contrary to the true intent and meaning of this Act, such proprietor or occupier or other person shall forfeit any sum not exceeding," &c.

Sect. 68. "And be it enacted, That all and every the footpaths on the sides of or adjoining to the said roads shall be and the same are hereby declared to be subject to the regulations of this act, and to be part of the said roads, and, unless the same shall be paved or pitched, shall be repaired and amended by the said trustees by such ways and means and in such manner as the said roads are and shall be repaired and amended."

(b) Stat. 8 & 9 Vict. c. 20, s. 46, enacts that: "If the line of the railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge, of the height and width and with the ascent or descent by this or the special Act in that behalf provided."

Sect. 49 enacts that: "Every bridge to be erected for the purpose of carrying the railway over any road shall (except where otherwise provided by the special Act) be built in conformity with the following regulations: (that is to say) *The width of the arch shall be such as to leave thereunder a clear space of not less than 35 feet if the arch be over a turnpike road, and of 25 feet if over a public carriage road, and of 12 feet if over a private road: The clear height of the arch*

*690] *In the year 1845, The London and Croydon Railway Company became the promoters of a proposed branch railway to commence by a junction with the London and Croydon Railway in the parish of Saint Paul, Deptford, in Surrey, passing, &c. (the direction was described in the case), and to terminate in the said parish of Saint Paul, Deptford; with all proper works and conveniences, &c. The line of such proposed branch *railway crosses two of the roads *691] under the jurisdiction of the said trustees, viz. a turnpike road called Trundley's Lane, and a turnpike road called Lower Deptford Road, which last-mentioned road is the road in question in this case. (The direction and termini of the latter road were then stated.) This road is a public highway, and had been used as such by the public for upwards of forty years continually before and up to the times of the excavations hereinafter mentioned.

The case then set forth some proceedings relative to the bringing in and passing of the Special Act, which it is unnecessary to state. It then proceeded :

Under these circumstances the bill was passed, and became an act of parliament, viz. stat. 9 & 10 Vict., c. ccxxxiv., local and personal, public, whereby The London and Croydon Railway Company were empowered to make and maintain the said branch railway.

By sect. 1 of the last-mentioned act it is (amongst other things) enacted, that all the provisions, matters, and things contained in The Railways Clauses Consolidation Act, 1845, "shall, so far as the same are applicable, extend to this act, and to the several purposes and things hereby authorized, as fully" as if therein re-enacted.

Sect. 3 is as follows : " And whereas plans and sections of the Branch Railway showing the lines and levels thereof, and also books of reference containing the names of the owners, lessees, and occupiers, or reputed owners, lessees, and occupiers of the lands through which the same is intended to pass, have been deposited with the clerks of the peace of

from the surface of the road shall not be less than 16 feet for a space of 12 feet if the arch be over a turnpike road, and 15 feet for a space of 10 feet if over a public carriage road; and in each of such cases the clear height at the springing of the arch shall not be less than 12 feet."

Sect. 50 enacts that, whenever a bridge is erected for carrying a road over the railway, then (unless it be otherwise provided by the Special Act) "the road over the bridge shall have a clear space between the fences thereof of 35 feet if the road be a turnpike road, and 25 feet if a public carriage road, and 12 feet if a private road."

Sect. 51 is as follows : " Provided always, That in all cases where the average available width for the passage of carriages of any existing roads within 50 yards of the points of crossing the same is less than the width hereinbefore prescribed for bridges over or under the railway, the width of such bridges need not be greater than such average available width of such roads, but so nevertheless that such bridges be not of less width, in the case of a turnpike road or public carriage road, than 20 feet: Provided also, That if at any time after the construction of the railway the average available width of any such road shall be increased beyond the width of such bridge on either side thereof, the Company shall be bound, at their own expense, to increase the width of the said bridge to such extent as they may be required by the trustees or surveyors of such road, not exceeding the width of such road as so widened, or the maximum width herein or in the special act prescribed for a bridge in the like case over or under the railway."

the counties of Surrey and Kent; be it enacted, that, subject to the provisions in this act and the said recited acts contained, *it shall be lawful for the Company to make and maintain the [*692 Branch Railway and works in the line and upon the lands delineated on the said plans and described in the said books of reference, and to enter upon, take, and use such of the said lands as shall be necessary for such purpose."

By sect. 19 it is enacted: "That in every case in which the said railway shall cross any of the roads under the jurisdiction of the said trustees" (meaning the trustees of the Bermondsey, Rotherhithe, and Deptford roads), "otherwise than at right angles, the bridges over the same shall be built with skew arches, so as not in any manner to alter the direction of or interfere with the line of the said roads, or the footpaths to the same."(a)

By stat. 9 & 10 Vict., c. cclxxxiii., local and personal, public, the London and Brighton and the London and Croydon Railway Companies, and all the undertakings belonging to them, were consolidated, and the said Companies incorporated as one, by the name of The London, Brighton, and South Coast Railway: and by *sect. 27 the [*693 new Company is invested with all powers to make branches and extensions which had been or should be granted to either of the two Companies now consolidated.

The line of the said branch railway crosses the Lower Deptford Road otherwise than at right angles, at a point in the parish of Saint Paul Deptford in the county of Kent. The said road, at the point where the above-mentioned line of railway crosses it, is a road of considerable traffic, being one of the two principal thoroughfares between London and Deptford. The average width of the carriageway of the said road at the said points of crossing, and for 50 yards on either side of the same, had been for upwards of forty years immediately before the making the excavations, and building the piers, hereinafter mentioned, and still is, 28 feet; and the average width of the footpaths on the east side of such part of the said carriageway had been, for upwards of forty years immediately before the making the excavations and building the said piers, 7 feet 3 inches, and on the west side thereof 8

(a) Sect. 18 of stat. 9 & 10 Vict. c. ccxxxiv., was also referred to in the course of the argument. It enacts: "That the said railway shall be carried over Trundley's Lane at the expense of the said Company by means of a bridge of the width of at least 30 feet, with a square soffit and with a side arch for the footpath of the width of at least 6 feet separate from the centre arch, by pillars, and the centre arch of the said bridge over Trundley's Lane shall be of a height from the present surface of Trundley's Lane to the centre of the soffit of such arch of not less than 13 feet 6 inches, and the side arch of the same bridge shall be of a height from the surface of the footpath to the centre of such soffit of not less than 10 feet: Provided always, That if the trustees of the Bermondsey, Rotherhithe, and Deptford roads shall think it desirable to lower Trundley's Lane, and shall lower the same, so that the then surface of Trundley's Lane shall be not more than 15 feet from the centre of the soffit of the proposed bridge, then the said Company shall repay to the trustees all sums of money necessarily expended by them in and about such lowering of the surface of the said lane."

feet 8 inches ; the average width of such part of the said road during such last-mentioned period, including both the said footpaths, being 43 feet 6 inches.

On 20th August, 1847, the defendants, acting under the authority and command of The London, Brighton, and South Coast Railway Company, and for the purpose of building the bridge hereinafter mentioned over the said road, as the same is described in the plan and sections so deposited as aforesaid, excavated portions of the footpaths on both sides of the said road at the above-mentioned point, in a direction parallel to *694] the line of the said road, to an extent of 4 feet out of the *foot-path on one side of the said road, and to the width of (a) out of the footpath on the other side of the said road ; and the said two excavations were continued for some days, and were 6 feet deep. The clear width of road and footpaths, taken together, which was left between the edges of such two excavations (measured in a line at right angles with the edges of such excavations), was 36 feet. Afterwards the defendants proceeded to fill up the said excavations with brickwork, in order to form the piers of a certain bridge by which the said branch railway was to be carried over the said road at the said point ; and they did fill up the said excavations with brickwork, and erect piers for the said bridge therein to the height and in the manner hereinafter mentioned. When the works had proceeded until the foundations of the said piers were level and (b) the surface of the said footpaths, the said trustees filed a bill in Her Majesty's High Court of Chancery. The case then stated the obtaining of an ex parte injunction, and other proceedings in Chancery, the result of which was the present indictment, but which it is unnecessary to detail. It then proceeded :

The said road was never entirely closed in consequence of the said excavation, or during the building of the said piers and bridge : and the traffic along the said road, except such part of it on which the said piers were so erected, continued, and still does continue, as before the building of the said bridge. By the building of these piers, each of the said footpaths was narrowed to the extent aforesaid : and the said piers have been continued from thence to the present time, and are respectively 17 feet in height and 85 feet in width, in a direction parallel *695] to the line of the said road and *footpaths : and afterwards the defendants built the said bridge over the said road upon the said piers, and have continued the said bridge so erected from thence hitherto. And the said bridge is built with a flat skew arch, so as not in any manner to alter the direction of or interfere with the line of the said roads, or the footpaths to the same, except so far as the facts in this case constitute any such alteration or interference. The said road is still narrowed and obstructed by the said bridge and the said piers to

(a) Blank in the case.

(b) Sic.

the extent aforesaid. The clear space under the said bridge, measured in the direction of the line of the arch and of the said railway, is 87 feet 8 inches; and the clear space under the said bridge, measuring in a line at right angles with the face of the said piers, is 36 feet; and the height of the said bridge to the soffit thereof is 17 feet. The width of the footpath now left on each side of the said bridge is (having regard to the traffic on the said footpaths) too narrow for the free passage of persons on foot along the said footpaths: and, if the said footpaths were to be widened by adding to them a portion of the said carriageway, the said carriageway would be thereby rendered too narrow for the free passage of horses and carriages, having regard to the number of horses and carriages daily passing along the said carriageway.

The pleadings, and a copy of the plans, sections, and books of reference, certified by the clerk of the peace, were to be taken as part of the case.

The question for the opinion of this Court was, whether or not the defendants were guilty of all or any of the nuisances charged in the respective counts: and the verdict was to be entered for the Crown or for the defendants, according to the opinion of the Court.

*The special case was argued in Trinity Term (June 6th), [*696 1849.(a)]

Sir *F. Thesiger*, for the Crown, referred to sections 59 and 68 of stat. 6 & 7 Vict. c. cviii.; sects. 1, 49, 50, and 51 of stat. 8 & 9 Vict. c. 20; and sects. 18 and 19 of stat. 9 & 10 Vict. c. ccxxxiv. He mentioned Attorney-General *v. Southampton Railway Company*, 9 Sim. 78, as an authority likely to be cited for the defendants, but relied upon the notice of that case in *Regina v. The Birmingham and Gloucester Railway Company*, 2 Q. B. 47 (E. C. L. R. vol. 42). And he referred also to *Regina v. The London and Birmingham Railway Company*, 1 Rail. Ca. 817, (b) which, however, he observed was decided under an Act differently worded from stat. 9 & 10 Vict. c. ccxxxiv.

Sir *J. Jervis*, Attorney-General, *contra*, commented upon sects. 8, 18 and 19 of the last-mentioned Act, and sects. 16, 49, and 51 of stat. 8 & 9 Vict. c. 20; and relied upon Attorney-General *v. Southampton Railway Company* as a direct authority for the defendants.

Sir *F. Thesiger* replied.

The judgment of the Court makes a more particular report of the arguments unnecessary. *Cur. adv. vult.*

PATTERSON, J., in this term (January 16th), delivered judgment as follows.

This was an indictment for nuisance to a turnpike road by building on it the piers of a railway bridge, *and narrowing it by such building. All the counts in the indictment charge the nuisance [*697

(a) Before Lord DENMAN, C. J., PATTERSON, COLERIDGE, and ERLE, Js.

(b) *At nisi prius*, Feb. 15, 1839.

to be to the carriage road: nothing is said about a foot road, throughout. For forty years before the building of the bridge the average width of the carriage road for 50 yards on each side of the spot where the bridge is now erected was 28 feet, and the footpath on one side was 8 feet 8 inches, and on the other 7 feet 3 inches. The piers of the bridge stand on the footpath on each side; they are each 4 feet wide, and are built parallel to the line of the carriage road, not directly opposite to each other, as the bridge is a skew bridge. The effect is, that the carriage road remains as it was before, 28 feet wide: but the footpaths are each narrowed; and the carriage road and footpaths together, which formerly were 48 feet 6 inches, are now only 36 feet. These are the dimensions stated in the case; but, if the piers occupy 8 feet, it would follow that the total width is now only 35 feet 6 inches. Whether the difference of 6 inches can be accounted for by the circumstance of the piers not being directly opposite to each other does not appear; but we do not think it material to our decision.

The prosecutors relied much on the 19th section of the special local act, 9 & 10 Vict. c. cxxxiv., which provides that, in every case in which the railway shall cross the road otherwise than at right angles, the bridges shall be made with skew arches, so as not in any manner to alter the direction of or interfere with the line of the said roads, *or the footpaths to the same*. The object of this section is plain, namely, to prevent the Railway Company from turning or bending the road so as to carry it at right angles under any bridge over which the railway passes, *698] and again turning or *bending it back on the other side of the bridge to its former direction and line: but the section does not touch or affect any question as to the width of the bridge or the narrowing of the road. The railway Company have complied with the section by erecting a skew bridge.

The question in this case depends upon the construction of stat. 8 & 9 Vict. c. 20, the Railways Clauses Consolidation Act, 1845. Now by that act it is provided that there shall be a clear space of 35 feet if the arch be over a turnpike road; provided that where the average available width for the passage of *carriages* is less than the width thereinbefore prescribed, the width of the bridges need not be greater than such average available width, but so as not to be less in the case of a turnpike road than 20 feet. It is further provided that, if the average available width of the road be afterwards increased, the Railway Company shall increase the width of their bridge if required, to an extent not exceeding the width of the road so widened, "or the *maximum* width herein or in the special act prescribed for a bridge in the like case over or under the railway."

Much discussion took place on the argument as to the word "*maximum*:" but the meaning of the Legislature is very plain. Where the average available width for the *passage of carriages* on any road exceeds

35 feet, it may be narrowed to 35 feet under the arch; for the arch is only required to be of that width: where it is less, the arch may be of the same width as the road, so as it be not less than 20 feet; and, if the road be afterwards widened, the arch must be proportionably widened up to, but not beyond, 35 feet. In the present case, the average available width of *the road for the passage of carriages is the same as it was before the erection of the bridge; the arch is of the same width, and [*699 exceeds 20 feet; and the road has not been widened so as to call on the Railway Company to widen the arch. Therefore the provisions of the Railways Clauses Consolidation Act, 1845, appear to have been complied with. No mention is made in that Act of footways, as distinguished from the road for the passage of *carriages*. If they are to be taken as part of the turnpike road, then the road has been narrowed from 43 feet 6 inches to 36 feet, and the arch of the bridge is only 28 feet instead of 35. We think, however, that the footpaths cannot be taken as part of the turnpike road over which the arch of the bridge was to be thrown, within the meaning of these acts of parliament. There is no pretence for saying that they can be taken into account in ascertaining the average available width of the road for the passage of *carriages*: and, as that width has been preserved as it was before in strict conformity with the acts of parliament, it is not true to assert, as every one of the counts in this indictment does, that persons cannot pass with their carriages as they used to do. The obstruction is to foot passengers only, which is not forbidden by the acts; neither is it charged as the nuisance complained of by this indictment. The cases cited in argument are wholly inapplicable to this indictment.

Upon the whole we are of opinion that a general verdict of Not guilty must be entered. Rule accordingly.

END OF HILARY TERM.

*700]

*HILARY VACATION.(a)

DOE on the demise of Lord ARUNDEL, v. FOWLER. Feb. 1.

Stat. 52 G. 3, c. 146, s. 5, requires parish registers to be kept at the parson's house or in the church. The custody of such registers by the parish clerk at his house is not, unless accounted for, such reasonably proper custody as to render receivable in evidence an extract made by a witness from a book produced to him as the parish register by the clerk, at the clerk's house.

EJECTMENT for a cottage, &c., in Wiltshire. On the trial, before WILLIAMS, J., at the last Wiltshire Spring assizes, it appeared that the lessor of the plaintiff claimed title on the determination of a lease for lives. To prove the death of one of the *cestui que vie*s, a witness stated that he went to a house in Kingston, Surrey, which had been pointed out to him by a person in the street as the house of the parish clerk; that the witness there saw a person calling himself parish clerk, who produced as the register of burials a book from which the witness had made an extract as evidence of the death in question. The learned Judge rejected the evidence, on the ground that it did not appear that the custody of the register by the parish clerk was the proper custody. The defendant having obtained a verdict,

Greenwood, in last Easter term, obtained a rule nisi for a new trial, on the grounds that this evidence was improperly rejected, and also that the verdict was against the evidence.

*701] **Crowder* now showed cause.—*Croughton v. Blake*, 12 M. & W. 205,† and *Bishop of Meath v. Marquess of Winchester*, in Dom. Proc. 3 New Ca. 183; S. C. 4 Cl. & Fin. 445, in which cases it was held unnecessary to show that a document came from the most proper custody or from strictly legal custody, do not apply; for, in the absence of explanation to account for the removal of the instrument, the parish chest was the only proper or legal custody. [COLERIDGE, J.—In *Roscoe on Evidence*, p. 102, 8th ed., the note of *Bishop of Meath v. Marquess of Winchester* is given thus: "So a document relating to a bishop's see may be produced from the custody either of his descendants, or his successors in the see." But the circumstances under which the instrument was there received as coming from the custody of the Bishop's descendants hardly warrant so general a proposition; for it appears that the instrument in question was of a date prior to the existence of any registry for the diocese.] Here the evidence that the person who furnished the extract was the parish clerk was wholly insufficient. (The discussion on the other point is omitted.)

Greenwood and *Stock*, contra.—The statement by a person that he was the parish clerk was of itself sufficient; on preliminary questions of fact for the judge strict legal evidence is unnecessary; *Regina v. Kenilworth*, 7 Q. B. 642 (E. C. L. R. vol. 53). The parish clerk commonly has the custody of the parish registers. His custody was a

(a) The Court sat in Banc on the 1st, 4th, 5th, and 6th, on the 11th, and from thence to the 16th inclusive, and on the 26th, of February

reasonably proper custody; and this is sufficient; *Bishop of Meath v. Marquess of Winchester*, *Croughton v. Blake*, **Armstrong v. Hewitt*, 4 Price, 216, *Doe dem. Neale v. Samples*, 8 A. & E. 151 [*702 (E. C. L. R. vol. 35), *Doe dem. Wildgoose v. Pearce*, 2 M. & Rob. 240, *Doe dem. Jacobs v. Phillips*, 8 Q. B. 158 (E. C. L. R. vol. 55). [COLERIDGE, J.—Stat. 52 G. 3, c. 146, s. 5, requires the parson to keep the parish registers in an iron chest; and the chest is to be kept either at the parson's place of residence, or in the church.]

PATTESON, J.—We cannot lay down any general rule on the question of proper custody; we must be guided by the circumstances of each particular case. My brother WILLIAMS thought that the register ought not to be kept at the clerk's house. This is quite true; for the statute directs that it shall be kept elsewhere. Still, if the witness had gone to the parson for the register, and had been referred by him to the house of the clerk, then although the register ought not to have been at the clerk's, it would have been authenticated to this extent, that it was at the clerk's with the consent of the parson; and the evidence might have been receivable. But no explanation whatever was given to account for this register being with the clerk. As to the other point, I think the evidence that the person who supplied the extract was parish clerk was quite sufficient. The objection is that the alleged register was not authenticated as the real register; it might have been a duplicate or a copy; the clerk's custody was unaccounted for. The rule, however, for a new trial will be absolute, on the ground that the verdict was against the evidence.

COLERIDGE, J.—I think that the learned Judge was *quite right in rejecting the evidence in question. The custody was [*708 wrong both as to place and person; and no explanation was given to show why the register was in such custody. The statute 52 G. 3, c. 146, s. 5, shows the custody to be wrong; and the provisions of that section are, I believe, kept alive by the late Registration Act.(a) By those provisions, which are very minute and stringent, an important duty is cast upon the clergyman with respect to the due custody of the register. I think upon the evidence we may take it that the person who had the custody in this case was the parish clerk. But no explanation was offered to account for his custody, as that the parson was unwell, or had sent the register to him for a special purpose. If any explanation had been offered, we might, perhaps, not scrutinise it very closely; an excuse of some sort, although it might not show the custody to be proper, might satisfy us that it was reasonable.

Rule discharged, on the first point.

Rule absolute, on the ground that the verdict was against the evidence.(b)

(a) See stat. 6 & 7 W. 4, c. 86, s. 49.

(b) WIGHTMAN, J., was at the Court of Appeal for Criminal Cases, ERLE, J., was sitting at Nisi Prius.

***704] *BARWELL and Others v. The Hundred of WINTERSTOKE.**
Feb. 4.

A wooden trough, by which water is conveyed from a spring to a pool at a distance from a mine for the purpose of washing the ore, is an "erection used in conducting the business" of the mine, within stat. 7 & 8 G. 4, c. 31, s. 2.

CASE against the Hundred of Winterstoke, under stat. 7 & 8 G. 4, c. 31, s. 2, (a) to recover compensation for the felonious demolition, by divers persons riotously assembled, of a certain erection of the plaintiffs used by them in conducting the business of a certain mine of the plaintiffs within the hundred.

Plea 2. That the said erection was not an erection used in conducting the business of a mine, modo et formâ. Issue thereon.

***705]** *On the trial before WILLIAMS, J., at the last Somersetshire Spring Assizes, the following facts appeared. Upwards of a year after the plaintiffs had entered upon and commenced working the mine in question, they took a lease of a slag bed and pool adjoining it, at a distance of about half a mile from the mine. The slag bed consisted of heaps of refuse ore, which had formerly been considered as of no value. Recently, however, a process had been discovered for extracting ore from the slag. Washing the slag was an important part of such process; and, to supply the pool with water for washing the slag, the plaintiffs diverted thereto a stream of water in the neighbourhood by means of a wooden trough erected upon piles. The trough did not approach the mine nearer than half a mile, which was as near as the nature of the ground admitted. The water supplied through this trough was at first used in washing the slag, and for no other purpose; but subsequently, and up to the time of the injury complained of, it had been regularly used in washing the ore gotten from the mine. It was for the demolition of this trough, as being an erection used in conducting the business of the mine, that this action was brought. For the defendants it was objected that the trough was not, under the

(a) The 2d section is as follows:

"And be it enacted, that if any church or chapel, or any chapel for the religious worship of persons dissenting from the United Church of England and Ireland, duly registered or recorded or any house, stable, coachhouse, outhouse, warehouse, office, shop, mill, malthouse, hopstack, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or branch thereof, or any machinery, whether fixed or movable, prepared for or employed in any manufacture, or in any branch thereof, or any steam engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, wagon way, or trunk for conveying minerals from any mine, shall be feloniously demolished, pulled down, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together, in every such case the inhabitants of the hundred, wapentake, ward, or other district in the nature of a hundred, by whatever name it shall be denominated, in which any of the said offences shall be committed, shall be liable to yield full compensation to the person or persons damaged by the offence, not only for the damage so done to any of the subjects hereinbefore enumerated, but also for any damage which may at the same time be done by any such offenders to any fixture, furniture, or goods whatever, in any such church, chapel, house, or other of the buildings or erections aforesaid."

circumstances, used in conducting the business of the mine; and that the learned Judge was bound to determine that question as a question of law. WILLIAMS, J., however, left the question to the Jury; and they found that it was so used. A verdict was directed for the plaintiffs; but leave was given to the defendants to move to enter a nonsuit, in case the Court should be of opinion that the above question was a question of law, and ought *to be determined in their favour. [*706 *Crowder*, in last Easter term, obtained a rule nisi accordingly.

Cockburn, *Montagu Smith*, and *Phinn* now showed cause.—The language in sect. 2 of stat. 7 & 8 G. 4, c. 31, which, with reference to the present question, is substantially the same as that used in sect. 7 of stat. 7 & 8 G. 4, c. 30, extends to the wooden trunk in this case. “Erection” in this statute is a larger word than “building,” and includes a wooden scaffold; *Regina v. Whittingham*, 9 Car. & P. 234 (E. C. L. R. vol. 38). If the question raised at the trial was one of fact, the finding of the jury is conclusive: if one of law, the Court will give effect to the declared intention of the section, which, obviously, was to protect everything in any way contributory to the conducting the business of a mine. Washing the ore is part of the ordinary business of mining; this trough was actually used for washing the ore, though erected for another purpose. The words “trunk for conveying minerals from any mine” do not limit the preceding words, but by extending the protection of the statute beyond the process and business conducted in and about the mine itself, show the very large sense of the previous words.

Crowder, *Barstow*, and *Prideaux*, contra.—The question is one of law, and is to be considered as if it arose on an indictment for felony under stat. 7 & 8 G. 4, c. 30, s. 7. As a question of law, it must be determined for the defendants. The erection could not be necessary for working the mine; for the mine had been worked without it. It was not locally connected with *the mine. Nor was its use connected with the business of mining; washing the ore is no more [*707 part of the business of a mine than smelting is. Washing is merely part of a process used in preparing the ore for market after the business of the mine is completed. One sort of trunk for a purpose foreign to the business of a mine is mentioned; this excludes any other sort of trunk unconnected with such business. In *Regina v. Whittingham* the scaffold was in the mine itself, and was erected to put the miners on the level of the vein at which they worked.

PATTERSON, J.—The rule must be discharged. The jury having decided that this trunk was, in fact, used in conducting the business of the mine, the only question in law is, whether such a trunk can be so used. It is hardly disputed that, if it were not for the words specifying a “trunk for conveying minerals from any mine,” the preceding words are large enough to include this trunk as an erection used “in conduct-

ing the business" of the mine. It seems that in all mines it is usual to wash the ore, in order to separate it from the earth. It is convenient to conduct this process as near as possible to the mine itself; and, in this case, the process was conducted as near to the mine as the nature of the ground permitted. The question is, whether an erection used for such washing is an erection used in conducting the business of a mine. I am of opinion that the business of a mine is not merely to get the rough ore from the bowels of the mine, but to produce the ore
 *708] itself separate from the earth which is brought *up with it. The words of the section are quite large enough to justify this construction; for, after specifying engines used in working the mine, they go on to "any erection used in conducting the business" of a mine, which must be for something more than the mere working of the mine itself. I agree that the same construction must be put on the statutes as if the question arose on an indictment for felony: but, even in such a case, the language of the legislature is amply sufficient to support our construction.

COLERIDGE, J.—I am of the same opinion. I quite agree that we are to determine the question as if it arose on an indictment for felony under the prior statute. That is a very good reason for not straining the language of the Legislature: but, if the present case is within its language, I am not deterred by the consequences of our construction. It is, undoubtedly, most important to protect an erection of this kind; but, whether this be important or unimportant, whether the statute be penal or not, we must give a full and fair interpretation to its provisions. I take it as almost admitted that, if it were not for the latter words with respect to a trunk for conveying materials from a mine, the preceding words would apply to the trunk in question. *Regina v. Whittingham* shows that the word "erection" is applicable to an erection of wood; in that case, however, there was no question as to the vicinity of the erection to the mine itself, or its connexion with the business of the mine. The question here is, whether the trunk can be said to
 *709] be used in *conducting the business of the mine. To say that the business of the mine is merely to bring the ore to grass, would certainly be too narrow a construction. It is to be observed that the question is not, whether the trunk was used in the working of the mine, but whether it was used in conducting the business of the mine. I think the business of the mine includes all that is done about the mine towards preparing the ore in a marketable state; and that all erections used for this purpose, or as places of deposit for gunpowder, candles, and other mining materials, are within the protection of the statute. It is said that the specification of a trunk for conveying the minerals away excludes this trunk for the supply of water. But I think that the specification of the trunk for conveying minerals away was purposely introduced, because it occurred to the legislature that a

trunk so used might not be a trunk used in conducting the business of the mine; and, so, that some further provision was necessary to complete the intended protection. But this trunk was used for the primary operations before the mineral is in a fit state to be conveyed away, and so was used in conducting the business of the mine.

WIGHTMAN, J.—I am of the same opinion. The words, “or any staith, building, or erection used in conducting the business of any mine,” coming after the words applicable to engines used for working the mine, admit a very large construction, and seem to have been purposely added in order to extend protection to such erections as might not be concerned in the working of the mine. The question is, whether this trough was used in the business of this mine. The ore, it seems, *is not brought up by itself, but together with earth and other [*710 matters attached to it, which must be separated from it to make what is brought up ore. This trunk was used in the process of such separation. That process, in my opinion, is part of the business of a mine, and is an entirely different process from that of smelting.

Rule discharged.(a)

(a) ERLE, J., was sitting at Nisi Prius.
Reported by H. Davison, Esq.

THOMPSON, Esq., M. P., v. INGHAM, Esq., and Another. Feb. 5.

Declaration in prohibition, stating a plaint in the county court prosecuted by one Batty for use and occupation of land by Thompson (plaintiff in prohibition), who appeared and protested that the title to the said land was in question: averment that in fact the title was in question in the action. Plea, that, when Thompson appeared and protested, Batty also appeared and protested that the title was not in question, and required the defendant in prohibition, being judge, to hear and determine the action; that thereupon defendant, then being judge, did hear and consider the evidence, &c., of the plaintiff in prohibition in support of his said protest, and also the evidence, &c., of Batty on the other side, and, having heard and considered, did adjudge that the title was not in question.

Held, that, if such a plea admits the title to be in question, it is bad, for want of jurisdiction in the judge, by stat. 9 & 10 Vict. c. 95, s. 58; but, if it be taken as pleading the decision of a competent court, it is equally bad; for, although the inferior court must determine the point in the first instance, yet, there being no writ of error from the county court, the question must be open to the superior Courts on motion for a prohibition; and, on declaration in prohibition, the question is one of fact, to be decided by evidence.

PROHIBITION. The declaration stated that, on 2d June, 1847, John Batty prosecuted in the county court of Westmoreland, at Kirkby Lonsdale (constituted under stat. 9 & 10 Vict. c. 95), before Theophilus Hastings Ingham, the Judge of the said Court, a certain plaint in an action of contract, issued *out of the said Court, for an alleged [*711 debt or claim of 4*l.* for the alleged use and occupation by William Thompson of a certain field of the said John Batty, &c., in which action the said J. Batty was the plaintiff, and W. Thompson (the plaintiff in prohibition) was the defendant. That Thompson, on the day,

&c., appeared in the said Court before the said T. H. I., the Judge thereof, and did then and there protest and insist that the said Court ought not to have, or take, and had not, cognisance of the said action; for that in the said action the title to the said land, to wit, to the said field, was in question. The declaration then averred, *that in fact the title to the said land, to wit to the said field, was in question in the said action*, and that the said Court ought not to have had, and had not, cognisance of the said action; and that each of the parties Thompson and Batty insisted that the said field was his soil and freehold during the alleged occupation: nevertheless the said Judge assumed to take and have cognisance of the said action, and proceeded to try and determine, and did in fact take cognisance of, the same, and try the said cause, and afterwards, to wit, on 28th July in the year aforesaid, gave judgment that the plaintiff should recover from the said W. Thompson the sum of 30s. The declaration then averred that the said J. Batty and the said T. H. Ingham are still proceeding in the said plaint, and prayed a prohibition.

Plea: That, when Thompson so appeared and protested that the title to the said land was in question in the said action, Batty also at the same time appeared and protested that the title was not in question therein, and then required the Judge to proceed to hear and determine,

*712] &c. That thereupon, on the same occasion when the said J. Batty and W. Thompson so appeared and protested as aforesaid, the said T. H. Ingham, then being the Judge, &c., did, in the same Court in and before which Batty and Thompson were so respectively appearing, hear and consider all the evidence, allegations, and arguments which Thompson produced, made, and used in support of such protest and position that the title was in question, and all the evidence, &c., which Batty produced, &c., on the other side; and having heard, &c., as aforesaid, *did then in the same Court, as and then being such Judge as aforesaid, and while Batty and Thompson were so respectively appearing in and before the said Court, consider, decide, and adjudge that the title to the said land was not in question in the said action*, and thereupon entertained, tried, heard, and determined the said cause, and gave judgment as in the declaration mentioned. And that on the said hearing of the said cause neither Thompson nor Batty produced, made, or used any evidence, allegation, or argument other than those which the Judge so heard and considered as aforesaid.—Verification.

Demurrer, assigning for cause: That the plea showed, not that the title to the land was not in question, but that the Judge thought and decided so: That the plea admitted that the title was in question, and sought to avoid it by showing that the Judge thought otherwise: That the plea consisted only of grounds of inference from which it was sought to be concluded that the title was not in question; and that it ought to have shown that in fact such title was not in question.

The demurrer was now argued.(a)

**Martin*, for the plaintiff.—Stat. 9 & 10 Vict. c. 95, s. 58, [*713 makes a direct provision that the Court shall not have cognisance of any action in which the title to any corporeal hereditament shall be in question. The declaration avers that in fact the title to the lands was in question: the plea does not traverse this, but alleges that Ingham, being judge, did adjudge that the title to the lands was not in question. He cannot give himself jurisdiction by merely stating his opinion that he possesses it. In *Lilley v. Harvey*, 5 Dowl. & L. 648, where the question was whether a prohibition should issue, WIGHTMAN, J., decided that the judge has authority to ascertain whether the title really is in question, but that, if he is wrong, and assumes jurisdiction when the title is in question, the Court above must prohibit. [PATTERSON, J.—The plea may be an argumentative denial that the title to the land came in question.] That is not its effect: the allegation is untraversed; and the plea avers that the decision of the judge on the question whether or not the title came in question is final. [COLERIDGE, J.—We do not sit on appeal from the decision of the judge; if the question arises in the County court the judge must deal with it. He referred to *Britain v. Kinnaird*, 1 Brod. & B. 432 (E. C. L. R. vol. 5).] When the judge has no jurisdiction the proceedings are a nullity. It is the duty of the superior courts to inquire whether the jurisdiction has been exceeded. It is true that this sometimes involves the correctness of the decision of the judge in the inferior court, but not by way of appeal. The Court may be obliged to try the question of fact whether the title came into question or not.

**Watson*, contrâ.—The judge clearly had jurisdiction over the cause: but in the course of the case it was alleged that the title [*714 to the land was in question. It is conceded that it is the duty of the judge to inquire whether that is so or not; if such be his duty, he must decide that point, otherwise he would have power to inquire, but not to determine. The question of jurisdiction, if involved in an incidental question of fact, must, like any other incidental question, be determined by the judge. If the action had been ejectment, the judge would have had no jurisdiction to entertain the cause, the proceedings would have been coram non iudice, and prohibition would lie. But, when there is a general jurisdiction over the cause, the incidental question as to title must be disposed of by the judge. Stat. 9 & 10 Vict. c. 95, s. 69, enacts that he shall be the sole judge in all actions brought in the Court, and shall determine all questions as well of fact as of law. And the 89th section makes his judgment final between the parties. The provisions with respect to replevin under the 121st section are different; there, if "either party" "shall declare" that the title is in question, the cause may be removed to a superior Court on security being given.

(a) Before PATTERSON, COLERIDGE, and WIGHTMAN, Js.

But, when the judge has power to institute the inquiry, his mistake in judgment on a matter of fact is no ground of prohibition; *Fearon v. Norvall*, 5 D. & L. 439. Whenever the question arises in evidence the judge must decide it. *Lilley v. Harvey* is an authority for the plaintiff; and so is *Owen v. Pearse*, 5 D. & L. 654, note (c). In *Ex parte Rayner*, 5 D. & L. 342,(a) the defendant had been summoned before the County *715] court *of Cambridge, and alleged before the judge that he had already been sued in the Borough Court of Cambridge in respect of the same claim, and that judgment had been recovered and execution issued against his goods. The plaintiff admitted this to be true; but the judge gave judgment for the plaintiff. On motion for a prohibition, it was held that the objection would have been proper ground for a writ of error if such proceeding were permitted by stat. 9 & 10 Vict. c. 95; but that, the decision being on matter within the jurisdiction of the judge, prohibition did not lie. Again, in *Robinson v. Lenaghan*, 2 Exch. 333,† where the summons had been served at a wrong place, the Court held that, the jurisdiction of the Court under the 80th section attaching on due proof of service, the question, what was proof of service, was for the judge, and that the superior courts could not reverse his decision. These cases bear on the act of parliament: but all the authorities show that when the inferior court has the power to inquire, it also has the power to determine. The test is, whether it has the power to enter on the inquiry. Thus affidavits are receivable to show that the inferior court could not institute the inquiry, but not that the court has come to a wrong conclusion on the evidence; *Regina v. Bolton*, 1 Q. B. 66 (E. C. L. R. vol. 41). In *Mould v. Williams*, 5 Q. B. 469 (E. C. L. R. vol. 48),(b) the justices by their warrant found the place on which timber was lying to be part of the highway; and the Court would not allow their jurisdiction to be questioned by evidence showing that it lay on land forming no part of the highway. Again, when in answer to an information under stat. 7 & 8 G. 4, c. 29, s. 34, a *716] *bonâ fide claim to a right of fishing was set up by the defendant and overruled by the justices, this Court refused a prohibition; *Regina v. Higgins*, 8 Q. B. 149, note (d) (E. C. L. R. vol. 55). [WIGHTMAN, J., referred to *Rex v. Sillifant*, 4 A. & E. 354 (E. C. L. R. vol. 31).] The rule for a mandamus there was discharged on the doubt whether the justices had jurisdiction to enforce the rate. A mere statement by the defendant that he acted under a reasonable supposition that he had a right to do the act complained of does not oust the justices of their jurisdiction under stat. 7 & 8 Geo. 4, c. 30, s. 24: the justices must determine that fact; *Regina v. Dodson*, 9 A. & E. 704 (E. C. L. R. vol. 36). The earlier case of *Rex v. Wrottesley*, 1 B. & Ad. 648 (E. C. L. R. vol. 20), is to the same effect. And the judgment of the

(a) *S. C. (Toft v. Rayner)* 5 Com. B. 162 (E. C. L. R. vol. 57)

(b) See *Ayrton v. Abbott*, ante, p. 1, 23.

Court of Exchequer in *Thomas v. Hudson*, 14 M. & W. 353, 377,†(a) illustrates the point. The principle which governs all the cases is, that where the judge has jurisdiction he must decide any incidental matter which arises in the progress of the cause. “Est autem eorum” (Justitiorum) “potestas, quod ex quo eis commissæ est causa, una vel plures, licet simpliciter, extenditur eorum jurisdictio ad omnia, sine quibus causa terminari non potest, quantum ad iudicium et executionem iudicii. Et eodem modo si causa fuerit incidens vel emergens et præjudicialis: ad alias verò res et alias personas non possunt jurisdictionem suam extendere, nec de aliis cognoscere quam de iis quæ in commissione continentur, cum fines mandati diligenter sint attendendi.” Bracton, fol. 108 b, lib. iii. *De Actionibus*, s. 3. The authorities all show that when the judge can *inquire he can decide, and that his decision on a matter within his jurisdiction is final. The allegation that the title was in question becomes immaterial; the judge must decide whether it was or not. [WIGHTMAN, J.—The judge decides, subject to prohibition if he exceed his jurisdiction. Whether or not the title comes in question may be matter of fact.] The true distinction is between those cases where there is a want of original jurisdiction, and those where something arises in the course of the cause to take it away: the judge must decide, in the latter case, whether such a state of facts exists.

Martin, in reply.—It is admitted here that a state of things existed which ousted the judge of his jurisdiction, but by his own judgment he assumes to give himself jurisdiction. The cases cited do not apply. The question of jurisdiction can in no case be determined by the Court whose jurisdiction is called in question. The line may be difficult to draw; but in all of them the question was as to the correctness of the decision of the judge over matter within his jurisdiction.

Curr. adv. vult.

PATTESON, J., on a subsequent day in this vacation (February 26th), delivered the judgment of the Court. After having shortly stated the declaration and plea, his Lordship continued:

To this plea there is a demurrer. If the plea, being in confession and avoidance, is to be taken to admit the statement in the declaration, that in fact the title was in question, it is clearly bad; for then the judge had no jurisdiction, under stat. 9 & 10 Vict. c. 95, s. 58; and *his thinking and deciding that he had would not give it him. But assuming that the plea does not admit that statement, but rather denies that it can be permitted to be made, by reason of the decision of a competent Court that the title was not in question, the point will be whether that decision is conclusive.

The law on this subject, so far as regards the analogous case of magistrates' convictions, was fully discussed in *Regina v. Bolton*, 1 Q. B. 66 (E. C. L. R. vol. 41); and it was there held that, where the

(a) Judgment affirmed in Exch. C., *Thomas v. Hudson*, 16 M. & W. 885.†

charge is such as, if true, is within the magistrate's jurisdiction, the finding of the facts afterwards by the magistrate is conclusive; but, where the charge is not such as, if true, would be within the magistrate's jurisdiction, no finding of facts can alter it.

The present case is between those so put. The judge had clearly jurisdiction, *prima facie*, to try a plea for use and occupation. The pleadings, if there were any in the County court, would not show that the title is in question: the point, whether it is or not, must of necessity arise upon the evidence; and, as soon as it appears that it is, the jurisdiction of the County court ceases. The judge must, of necessity, determine that point for the time, because on it depends whether he hears the case on the merits. Is then his determination conclusive? We think that it is not. The objection is analogous to a plea to the jurisdiction in other courts, which is indeed determined in the first instance by the Court in which it is pleaded, but is subject to a writ of error. The County court Act gives no writ of error, or appeal of any sort; but then it is presumed that the Court deals only with matters *719] within its jurisdiction. *If a doubt arises as to that question, we think it impossible to contend that any of the provisions of the Act make the solution of that doubt by the Court itself final. If so, the question must be open to one of the superior courts on motion for a prohibition, by affidavit; and, if that Court, as in the present case, directs that the party should declare, then the question becomes one of evidence.

In either view of the plea, therefore, we are of opinion that judgment must be for the plaintiff.

Judgment for plaintiff.(a)

(a) Reported by T. Bros, Esq.

See *Chew v. Holroyd*, 8 Exch. 249.†

MEYRICK and IBBETSON, Executors, &c., of WILLIAM MEYRICK, deceased, v. MARY ANN ANDERSON. Feb. 5.

Debt on bond by plaintiffs as executors, against defendant as executrix of one Susannah Scott, who was executrix of W. N. Plea that Susannah died intestate, without this that the defendant ever was rightful executrix of the said Susannah.

Held, on special demurrer, that the plea, though good in form, was no answer to the action, for an executor de son tort of a rightful executor is liable in the same manner as a rightful executor for the debt of the original testator.

DEBT by plaintiffs as executors of the last will and testament of William Meyrick, deceased, against defendant, as executrix of Susannah Scott, deceased, who in her lifetime, and at the time of her death, was executrix of the last will and testament of William Newman, deceased, on a bond made by Newman to Meyrick in the sum of 800*l.*: the count charged that Newman did not pay in his lifetime, nor did Susannah Scott in her lifetime pay, nor hath defendant paid, to

*Meyrick in his lifetime, or to plaintiffs as executors as afore-said, since his decease. [*720

Plea: That the said Susannah Scott died intestate, without this, that defendant ever was, or is, the rightful executrix of the last will and testament of the said Susannah Scott; conclusion to the country.

Demurrer, alleging for cause: That the traverse taken by the plea, and the issue thereby tendered, is too narrow; and that the traverse is not direct of any allegation contained in the declaration; because the plea only tends to raise the question, whether the defendant was rightful executrix, whereas evidence showing that defendant was executrix de son tort would support the declaration; and for that the plea should have directly traversed the declaration, and the averment therein, that defendant was executrix of the said Susannah Scott. And that, if the plea is to be taken as in confession and avoidance, then it is insufficient, because it introduces new matter, viz., that S. Scott died intestate, and therefore it ought not to have concluded to the country. Joinder.

The demurrer was now argued. (a)

Willes, for the plaintiffs.—It is quite consistent with the plea, that the defendant is executrix de son tort; and, if so, she is chargeable. At common law the executor de son tort is liable like the rightful executor. In *Webster v. Webster*, 10 Vesey, Jun. 98, an executor who had acted de son tort for sixteen years, afterwards took out administration; and, on his being sued as executor, it was held that he might plead the Statute of *Limitations, because he was liable to be sued while executor de son tort. The forms of declaration against a rightful executor [*721 and an executor de son tort are precisely the same; and it is sufficient to show an intermeddling with the goods to support a charge against the defendant as executor. The last decision is *Wood v. Kerry*, 2 Com. B. 515 (E. C. L. R. vol. 52). Again, at common law, the executor of an executor was bound to administer the goods of the prior testator; but it was doubtful whether he would be liable for a devastavit of such goods committed by his own immediate testator, that being a personal wrong, which died with the person committing it. This led to the statutes 1 stat. 30 Car. 2, c. 7, and 4 & 5 W. & M. c. 24, s. 12. The former Act is confined to the executor of an executor de son tort. The latter enactment is declaratory as well as enacting. [PATTERSON, J.—Neither of these applies except to the case of devastavit. What is the meaning of “shall” “be liable” “in the same manner?”] It means out of the goods of the first testator; note (8) to *Wheatley v. Lane*, 1 Wms. Saund. 219 d. The executor of an executor, sued since the statutes, must not only show that he has administered the goods of the original testator which have come to his hands, but also a plene administravit by the first executor, or at least that the second executor has no assets of the first executor whence any devastavit by the first

may be satisfied; *Wells v. Fydell*, 10 East, 315. There is no direct authority on the point. At common law the executor, whether by right or de son tort, is liable: it is here contended that the executor de son *722] tort of an executor is in precisely the same position as *the right-ful executor of an executor de son tort or of a rightful executor since the statutes. In *Hammond v. Gatcliffe*, Andr. 252, the Court intimated an opinion that the executor de son tort of an executor de son tort is not liable for a devastavit of the prior executor de son tort, the case not being provided for by 1 stat. 30 C. 2, s. 7. [PATTERSON, J.—That case is rather questioned by my Brother WILLIAMS, in his book.] It is not cited as an authority in the text (vol. 2, p. 1471(a)); and the note (k) which refers to it gives no opinion as to its authority, but merely the reason assigned by PROBYN, J., for the decision; namely, that in the first part of 1 stat. 30 Car. 2, c. 7, executors de son tort are not named, though afterwards they are expressly mentioned. In truth, there can be no succession of executors de son tort; and that reason would support the decision. But the construction of the statute ought not to be as intimated in *Andrews*, p. 252: the statute means such persons as by the common law were held executors. There is no reason for confining “all and every the executors” to all and every the rightful executors, when executors de son tort are also, in legal contemplation and legal language, executors. The same expression occurs in stat. 4 & 5 W. & M. c. 24, s. 12, which is the statute applicable to the present case. Applying the reasoning of PROBYN, J., in *Hammond v. Gatcliffe* to that statute, it will be an authority for the plaintiff in the present case; but the words “any executor” and “all and every executor,” in stat. 4 & 5 W. & M. c. 24, s. 12, include an executor de son tort; and then the case falls within *Wells v. Fydell*; and a defendant *723] *admitting himself to be an executor of an executor must so plead as to exclude any devastavit by his immediate testator.

Poulden, contra.—The executor de son tort is not chargeable as the executor of the original testator. He does not represent him. In 1 *Williams on Executors*, vol. 1, p. 207, 4th ed., it is said: “Although the executor cannot assign the executorship, yet the interest vested in him by the will of the deceased may, generally speaking, be continued and kept alive by the will of the executor; so that, if there be a sole executor of A., the executor of such executor is to all intents and purposes the executor and representative of the first testator. But if the first executor dies intestate then his administrator is not such a representative, but an administrator de bonis non of the original testator must be appointed by the Ordinary; for the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power

to another in whom he has equal confidence; and so long as the chain of representation is unbroken by any intestacy the ultimate executor is the representative of every preceding testator. But the administrator of the executor is merely the officer of the Ordinary, and has no privity or relation to the original testator, being only commissioned to administer the effects of the intestate executor and not of the original testator." Again it is said at page 247: "If an executor dies before probate, although, as already mentioned, the acts which he may legally do before probate stand firm and good, yet his executor may not prove *both wills, and so become executor to both the testators." [*724 (He also referred to 1 Williams on Executors, pp. 380, 387.)] [PATTESON, J.—All these passages only show that the administrator of the executor has no title to the goods of the first testator.] The principle applies, that there must be a succession between the original testator and the executor of the executor to charge him. The rightful executor of the executor is the representative of the first testator. A person by intermeddling with the goods may make himself executor de son tort of the executor; but that cannot make him executor of the first testator. The Act 1 stat. 30 Car. 2, c. 7, does not apply to this case; it was passed to make the representatives of an executor de son tort liable in cases where they were not liable at common law. *Hammond v. Gatcliffe* is an authority for the defendant as far as it goes. An executor de son tort at common law would not be liable, because the first testator can be represented only through a chain of succession. In all cases the party must be charged as executor, whether he be so by right or wrong; *Scott v. Wedlake*, 7 Q. B. 766 (E. C. L. R. vol. 58); *Wood v. Kerry*, 2 Com. B. 515 (E. C. L. R. vol. 52), where MAULE, J., says: "it has been held for centuries that such is the proper mode of declaring; the ground being, that there is no other form of writ in the register, than one charging the party as executor generally." If then an executor de son tort be not liable, he must be able to plead as here. Ne unques executor would deny that the defendant is executor whether by right or by wrong. The plea that defendant is not administrator but executor is a plea in abatement; but it must be pleaded *with a traverse, absque hoc that the deceased died [*725 intestate.(a)

Willes, in reply.—No precedent has been shown of any plea like this. The rule is that the executor de son tort is liable wherever the rightful executor is liable, but that he cannot clothe himself with the rights of the rightful executor: he cannot discharge himself by pleading that he is executor de son tort. [WIGHTMAN, J.—Independently of the statute would the executor have been liable?] There were authorities both ways; *Astry v. Nevit*, 2 Lev. 133, and Anonymous case in 2 Mod. 294. [WIGHTMAN, J.—In Com. Dig. *Administrator* (C 3), it is said

(a) 2 Wms. Executors, 1656, and note (y), *ibid.*; Com. Dig. *Pleader* (2 D. 4)

that an executor de son tort may be charged jointly with the rightful executor. This would appear to put them on the same footing.]

Cur. adv. vult.

PATTESON, J., in the same vacation (February 26th), delivered the judgment of the Court.

The defendant is sued as executrix of Susannah Scott, who was executrix of William Newman, on a bond executed by Newman. The defendant pleads that Susannah Scott died intestate, without this, that she the defendant ever was *rightful* executrix of Susannah Scott. To this plea there is a special demurrer.

As the declaration against an alleged executor is in the same form whether the defendant be rightful executor or executor de son tort, we think it was necessary for the defendant to plead as she has done *726] in order to raise the question whether an executor de son tort of a rightful executor can be sued for the debt of the original testator. It is remarkable that there should be no direct authority upon this point.

The statutes 1 stat. 30 Car. 2, c. 7, and 4 & 5 W. & M. c. 24, s. 12, throw scarcely any light on the subject. They were passed in respect of devastavits committed by the original executor or administrator, which being torts, it was thought that the representative of such executor or administrator could not be made liable, on the principle "*Actio personalis moritur cum personâ*." These statutes do not proceed on the ground of succession; for they make the executor of an administrator, and the administrator of an executor, liable, and are no authority upon the point now in question. Neither is the case of *Wells v. Fydell*, 10 East, 315, which has reference to the provisions of those statutes. Neither do the authorities cited by the learned counsel for the defendant apply. They only show that an executor de son tort cannot acquire any rights, and that on the death of a rightful executor intestate his administrator does not represent the original testator, about which there is no doubt. The question is not as to the rights, but as to the liabilities, of an executor de son tort; and whether the defendant, having chosen to take upon herself the office of executrix of Susannah Scott, does not thereby incur all the liabilities to which she would be subject if she were rightful executrix.

We are of opinion that she does. Susannah Scott must be taken to have possessed herself of all the assets of Newman; and the defendant, *727] being estopped from saying that she is not executrix of Susannah Scott, must be taken to have had those assets of Newman, if any, which Scott left unadministered, transmitted to her; and, if there be none such transmitted, and Susannah Scott committed no devastavit, and the defendant has duly administered all the assets of Susannah Scott, she has a good answer to this action. The plaintiffs ought not, if there be assets of Newman, either independent of or in consequence

of any devastavit by Susannah Scott, to be deprived of their remedy against those assets because no one thinks proper to take out administration de bonis non to Newman; nor ought they to be driven to take out such administration themselves, when another person (the defendant), professing to be executrix of Susannah Scott, has possessed herself of those assets. If indeed there had been an administrator to Susannah Scott, and no devastavit committed by her, and no executor de son tort to her, the plaintiffs might be obliged to take out administration de bonis non, because the administrator of Susannah Scott could not have possessed himself of the assets of Newman. But here the defendant, as we have already said, must be taken to have possessed herself of such assets, if any, in her assumed character of executrix of Susannah Scott.

Our judgment must be for the plaintiffs.

Judgment for plaintiffs.(a)

(a) Reported by T. Bros, Esq.

***ARMITAGE v. INSOLE and Another.** *Feb. 5.* [*728

Assumpsit on an agreement "to give yearly free to the plaintiff during three years twenty tons of coals, to be put free on board ship at Cardiff for the use of the plaintiff." Breach, that defendants did not give plaintiff yearly or at any time during the said three years twenty tons of coals, &c.; in the terms of the contract. Held, bad for want of an averment by the plaintiff that he was ready and willing to receive the coals, and that he had named a ship on which the defendant was to deliver them.

ASSUMPSIT on an agreement, whereby plaintiff agreed to conduct the sale and disposal of the defendants' coals, to carry out their instructions, promote their interests, and extend their connexion, to the utmost of his ability and power, throughout Ireland, for three years from 1st January then next, and for that purpose to visit certain places in Ireland at stated times in each year; and defendants agreed to engage the services of the plaintiff as above described for three years, and to pay him the yearly sum of 120*l.*, viz., 60*l.* every 1st day of July and 1st day of January from the date thereof. And defendants further agreed to give yearly free to the plaintiff during the said three years twenty tons of coals, to be put free on board ship at Cardiff for the use of the plaintiff, in lieu of all charges for stationery and so forth.

The declaration, after alleging mutual promises, and performance by the plaintiff of the conditions precedent on his part, as far as was necessary to support the breaches for discharging him from his employment by the defendants under the contract, and for their refusing to pay him the salary agreed on, assigned a further breach as follows: Nor did nor would the defendants give to the plaintiff yearly, or at any time during the said period of three years, twenty tons of coals,

or any coals whatever, free on board ship at Cardiff for the use of the plaintiff; but, on the contrary thereof, they, the defendants, wholly *729] neglected and *refused so to do, and have not at any time delivered or given to the plaintiff at Cardiff or elsewhere any coals whatever; and there is now due and owing from the defendants to the plaintiff under the said agreement a large quantity (viz.) sixty tons of coals, the same being of great value (viz.) 24*l*.

Demurrer. Joinder.

Mellish, for the defendants.—This is a demurrer to part only of the breach; but the plaintiff is entitled to judgment, although the residue of the breach is sufficiently assigned; *Lush v. Russell*, 4 Exch. 637.† The defendants agree “to give yearly free to the plaintiff during the said three years twenty tons of coals, to be put free on board ship at Cardiff for the use of the plaintiff.” The ship, then, must be selected, and its destination fixed, before this part of the contract can be complied with. The agreement is silent on the subject; but it is clear that the port must be first selected either by the plaintiff or the defendants. But it is the duty of the plaintiff to select the ship and the port of discharge, as, until that is done, the defendants cannot comply with the contract by delivering the coals free on board. It is therefore a condition precedent to be performed by the plaintiff: and he should have averred that he was ready and willing to accept the coals, and that he had given the defendants notice thereof, and had named a ship and the port at which they were to be delivered; *Rae v. Hackett*, 12 M. & W. 724.†

*730] *A. I. Johnston*, contra.—There is no condition *precedent necessary to be noticed by the plaintiff. *Reade v. Meniaeff*, 7 Com. B. 152, 161 (E. C. L. R. vol. 62), shows the general principle, that contracts of this kind should not be construed narrowly. The substance of the contract was, that the plaintiff should have the coals. The defendants would be at liberty to deliver them at any time within the year, even if a request had been made by the plaintiff; *Startup v. Macdonald*, 6 M. & G. 593. But notice ought to come from the defendants that they were ready to give the coals on the plaintiff naming the ship. Something was to be done at a time to be ascertained by the defendants. (He then referred to *Heron v. Treyne*, 2 Ld. Raym. 750, and *Halling's Case*, 5 Rep. 22 b.) The plaintiff's readiness to accept the coals was a condition subsequent to notice, by the defendants, that they were ready to deliver them; *Hudson v. Haslam*, 7 Com. B. 825, 833 (E. C. L. R. vol. 62).

PATTESON, J.—The contract clearly shows a duty cast on the plaintiff to name the ship at some time or other; but, it is argued, not until the defendants have given notice of their readiness to supply the coals, because no time is fixed for the delivery. If “yearly” mean at the end of the year, then the time is fixed, and the plaintiff should have

named the ship at that time. Perhaps that is the meaning of the contract. But, if otherwise, and if the defendants could call upon the plaintiff at any time during the year to accept the coals upon reasonable notice (for notice must be reasonable), even then the plaintiff must have named the ship, and should have averred that he was ready and willing to *accept the coals, and that he had a ship ready to [*731 receive them.

CCLERIDGE, J.—I am of the same opinion. Where circumstances, left uncertain by the contract, are of such a nature that one party cannot perform his part of the contract until they are fixed, the other party, insisting on the contract, ought to fix those particulars. Here both time and place should have been fixed by the plaintiff; but certainly place.

WIGHTMAN, J.—The main difficulty arises from the uncertainty of the time when the coals are to be put on board. I should say the agreement being silent as to time, that it must be at the option of the plaintiff. But, however that may be, the defendants clearly cannot give the coals free on board, until they know the ship, and at what port it is to discharge. Whatever, therefore, the construction of the agreement may be as to time, the plaintiff must fail for want of averring that he was ready and willing to name a ship.

Judgment for defendants.(a)

(a) Reported by T. Bros, Esq.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

The Governor, &c., of the Poor of the City of BRISTOL *v.* The QUEEN. *Feb.* 5.

Reported, 13 Q. B. 414 (E. C. L. R. vol. 66).

*732] *IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

BLAIR, Administrator, &c., of BUCKLEY, v. ORMOND and Another,
Executors, &c., of WOOD. Feb. 5.

A bond made in 1812 conditioned to replace a sum of Government stock of the value of 792*l.* is sufficiently stamped with a 3*l.* stamp, under stat. 43 G. 3, c. 149, Schedule, part 1, tit *Bond*, though accompanied by a deposit of title deeds, and an agreement, insufficiently stamped, of even date, for the mortgage of property comprised in such title deeds as a collateral security.

DEBT on a bond, bearing date 5th December, 1812, of which Wood was the obligor and Buckley the obligee.

The condition of the bond recited that Buckley had agreed to advance to Wood 877*l.* 4*s.* 1*d.* stock of the five per cent. navy annuities, &c., or the produce of the sale thereof, without any advantage whatever on Buckley's part, otherwise than he would have been entitled to in case the same stock had continued to remain in his own name; and that Buckley had accordingly caused the same stock to be sold, and had paid the produce thereof, amounting to 792*l.* 4*s.* 2*d.* to Wood; and that it had been agreed between Wood and Buckley that the like sum of 877*l.* 4*s.* 1*d.* stock in the said navy five per cent. annuities should be replaced and transferred to Buckley at the time and in manner therein-after mentioned. The condition of the bond was: That if Wood should, on or before 5th June then next, purchase the like amount of the said stock, and transfer the same into the name of Buckley, &c., and pay him, in lieu of the dividends thereof, such sums as he would have been entitled to receive as or for the dividends of the said amount of such *733] stock in *case the same had continued standing in his name, then the said obligation was to be void.

Plea (among others), non est factum. Issue thereon.

On the trial, before COLERIDGE, J., at the Bristol Summer Assizes, 1848, it appeared that the bond had a 3*l.* stamp; and that, at the time of the execution, certain title deeds to real estate, the property of Wood, were deposited with Buckley, accompanied by a written agreement, of even date with the bond, between Wood and Buckley, whereby Wood, after acknowledging the receipt of 792*l.* 4*s.* 2*d.* as the proceeds of 877*l.* 4*s.* 1*d.* stock of the five per cent. navy annuities, &c., and reciting the said bond, agreed, by way of collateral security for performance of the condition, to allow the said title deeds to remain in the hands of Buckley, and also to execute a mortgage of the property comprised therein. This agreement had a 16*s.* stamp. The learned Judge ruled that the bond was insufficiently stamped under stat. 48 G. 3, c. 149, and directed a verdict for the defendant on the above issue. The plaintiff tendered a bill of exceptions. Verdict for defendant.

Error was brought upon the judgment entered on this verdict; and the case was now argued before MAULE, CRESSWELL, WILLIAMS, and TALFOURD, Js., and PARKE, ALDERSON, and PLATT, Bs.

Taprell, for the plaintiff in error.—The bond was sufficiently stamped under stat. 48 G. 3, c. 149, Schedule, Part 1, title “Bond,” as a bond “given as a security for the transfer or retransfer” of a share in the Government stocks.

The Court then called upon

**Butt*, *contrà*.—The stamp would be sufficient for a simple money bond, or bond given simply as a security for the replacing [*784 of government stock; but the bond in question is specifically designated in a subsequent title of the same part of the Schedule referred to, as a “bond, accompanied with a deposit of title deeds, for making a mortgage, wadset, or other security, on any estate or property therein comprised.—See Mortgage.” Now, on reference to the title “Mortgage,” it appears that a mortgage made, “as a security for the transfer or retransfer” of Government stock of the value of between 500*l.* and 1000*l.*, requires a 4*l.* stamp. [ALDERSON, B.—This is a bond, accompanied with a deposit of title deeds; it is a bond for replacing stock, and not a bond for making a mortgage.] Again, the bond and agreement are to be taken as one security; so taking them together, the agreement would, under title “Mortgage,” and under the head “also any agreement, contract, or bond, accompanied with a deposit of title deeds, for making a mortgage,” require a 4*l.* stamp; and then the bond would require a 1*l.* stamp under another head of title “Bond,” as a “Bond in England,” “given as a security for the payment of any sum of money, or for the transfer or retransfer of any share in any of the stocks or funds before mentioned, which shall be in part secured by a mortgage or wadset, or other instrument hereinafter charged with the same duty as a mortgage or wadset, bearing even date with such bond.” The objection may be taken either way; if the instruments are to be treated as separate securities, the bond alone required a 4*l.* stamp; if they are to be treated as one entire security, then the agreement required a 4*l.* stamp, and the bond a 1*l.* stamp.

*PARKE, B.—We are all of opinion that this bond was sufficiently stamped as a simple bond for the retransfer of stock: and [*785 it is immaterial that another instrument, executed as a collateral security, was not sufficiently stamped.

Venire de novo awarded.(a)

(a) Reported by H. Davison, Esq.

On the second trial, a verdict was found for the plaintiff, subject to a special case; upon which judgment was given for the plaintiff, May 29th, 1851.

The QUEEN v. The Inhabitants of CRICKLADE SAINT SAMPSON.

By an enclosure act, incorporating stat. 41 G. 3, c. 109 (the General Enclosure Act in force at the time), the Commissioners for enclosing certain common lands were authorized to stop up, divert, or alter any public ways over the waste, with the concurrence of two justices. They were also empowered to set out new ways, which, when certified by two justices to be complete, were to be repaired by the parish. Before the enclosure act, a public bridleway led across a common. There was no definite track where the land lay open. The Commissioners ordered the common to be enclosed, and set out a road thirty feet wide, with the same termini and in the same line as the old bridleway, and in their award directed that it should be a public bridleway and a private carriage road for certain persons, who should keep it in repair. The road was set out accordingly. On the trial of an indictment against the parish for not keeping it in repair, no order or certificate of justices was proved.

Held: That the old public way was never effectually stopped; that the defined road set out was in effect the same way; and that the parish were still liable to repair it as a bridle road, and were not exonerated by the fact that it was now set out as a private carriage road also.

INDICTMENT against the inhabitants of the parish of Cricklade St. Sampson, for not repairing an ancient public bridleway. Plea, Not Guilty. Issue thereon.

On the trial, before WILLIAMS, J., at the Salisbury Spring assizes, 1849, it appeared that, before the passing of stat. 54 G. 3, c. clx.,^(a) *736] there was an ancient public *bridleway, leading through old enclosures into and across a common, called Cricklade Common, which was part of the waste subsequently enclosed under the provisions

(a) Local and personal public, "For enclosing lands in the manors of Great Chelworth and Little Chelworth, in the parishes of Cricklade Saint Sampson and Cricklade Saint Mary, in the county of Wilts.

The act is made subject to, and incorporates, stat. 41 G. 3, U. K. c. 109, the General Enclosure Act then in force."

Sect. 17 enacts: "That it shall be lawful for the said Commissioners, and they are hereby authorized and empowered, to stop up, divert, turn, or in any other way alter any old carriage road, bridleway, or footpath leading through or over the said common or waste lands hereby directed to be divided, allotted, and enclosed, or passing or leading through any of the old enclosures within the said manors of Cricklade Saint Sampson, and Cricklade Saint Mary, or either of them; and the soil of the roads and ways so to be stopped up, diverted, turned, or in any other way altered, shall be deemed and taken as part of the lands and grounds so to be divided, allotted, and enclosed: Provided always, That no such carriage road, bridleway, or footpath, passing or leading through any of the said enclosures in the said manors, shall be stopped up, diverted, turned, or in any other way altered, without the concurrence and order of any two justices of the peace for the said county of Wilts, and not interested in the repair of such roads, and which order shall be subject to an appeal to the quarter sessions for the said county of Wilts, in like manner and under such forms and restrictions as if the same had been originally made by such justices."

Sect. 18 enacts: "That when and so soon as two or more of His Majesty's justices of the peace for the said county of Wilts, at any special sessions to be holden by them, shall find, and shall under their hands and seals certify and declare any of the public carriage roads to be set out in pursuance of the said recited act and of this act, or any part of any such road, to be fully and sufficiently formed, repaired, and completed, such road or roads, or so much thereof as shall in any such writing be described and certified, shall from thenceforth be supported and kept in repair by such persons, and in like manner as the public roads within the said parishes, or that part or district of the said parishes, or either of them, in which the same shall be, are or ought to be by law amended and kept in repair; and every such certificate shall, at the general quarter sessions of the peace to be holden for the county of Wilts next after the date thereof, be filed of record by the clerk of the peace for the said county."

of that act. The evidence showed that, before the enclosure, this common was of a very irregular shape. In parts it was so narrow that the bridleway *might fairly be described as passing along a broad lane, more than thirty feet wide; in other parts the common [737 opened into a wide open field, across which the persons using the right of way rode much as they pleased, so that in those parts there was no definite track. The Commissioners by their award directed this common to be enclosed. They made no alteration in the bridleway, so long as it passed between the old enclosures. They ordered that, across the common to be enclosed, there should be set out a road thirty feet wide, as a "public bridle road," and as a "private carriage road" for certain persons, the owners of certain estates named in the award, and directed that the road should be kept in repair by those persons.

The road was accordingly set out in fact: and at the trial it appeared that the whole of that portion which crossed what had been the common was out of repair. The termini of the road as at present existing were the same as those of the old right of way; but, as appears from the above statement of facts, it did not precisely follow the track over which the public were anciently accustomed to ride. No evidence was given of any certificate or order of justices. On these facts a verdict was directed for the Crown, subject to leave to enter a verdict for the defendants. In the ensuing term *Greenwood* obtained a rule nisi accordingly.

In this vacation,(a)

Crowder, Keating, and Slade showed cause.—There clearly was at one time a public bridleway, which the inhabitants of the parish were bound to repair. It lies *upon the defendants to show something to put an end to this liability. Stat. 54 G. 3, c. clx., by [738 itself clearly did not do so. Neither did the Commissioners under that act do anything which could operate in law to make the ancient highway cease to be one. They had no authority given them to stop up highways without an order of justices, which was not proved to have been made. And the award shows that they did not intend to stop up the way, even if they had power to do so. The award, on the contrary, sets out the road to be used as a public bridle road. It is true, it also sets it out as a private carriage road for certain persons, and directs it to be repaired by them. The effect of that may be, that the parish have a remedy over against these individuals: that, if it be the case, does not take away the liability of the parish to the public; *Rex v. St. George Hanover Square*, 3 Camp. 222. Or it may be that the parish have no remedy over, though they may be obliged to repair the bridleway more frequently in consequence of the carriage traffic: that, though a hardship on the parish, cannot deprive the public of their right to have the highway kept in repair. Unless the defendants are

(a) February 1st. Before PATTESON and COLERIDGE, J.

liable on this indictment, the public right is lost; for it is clear that no indictment would lie against the persons who, by the award, are directed to keep the carriage road in repair, for not keeping up the public road.

If there is a defence arising from the award of the Commissioners, it is not open on Not guilty. When a statute takes away the common law liability of the parish, that may be given in evidence under Not guilty; but, when the statute does not by itself take away the liability, *739] so that, to show that the liability has ceased, it *is necessary to prove matters in pais subsequent to the statute (such as the award of Commissioners, or an order of justices), the defence should be pleaded specially.

Greenwood and Hodges, contra.—The evidence shows that the road, the subject of this indictment, is not the same as the ancient bridleway. The Commissioners had power to divert the line of the old way and substitute a different line: but it was a condition to this power, that an order of two justices should be obtained. They have, in fact, stopped up the old road, and laid out a new one; but if there was no order of justices that was not effectual in law; and the public still have a right to ride over the old track, and the parish are liable to keep the old road in repair; *Logan v. Burton*, 5 B. & C. 513 (E. C. L. R. vol. 11). (a) But the question now is, not whether the old road has been effectually extinguished, but whether the burden of repairing the new line of road is cast upon the defendants. They cannot be liable to repair both the old and the new line of road. And, as stat. 54 G. 3, c. clx., s. 18, makes the certificate of two justices a condition precedent to the liability to repair the new line, it makes the absence of such certificate a complete defence under Not guilty. *Cur. adv. vult.*

PATTESON, J., on a subsequent day in this vacation (February 26th), delivered the judgment of the Court.

This was an indictment for non-repair of a public bridle road. A verdict was found for the Crown, by consent, subject to a motion to enter a verdict for the defendants, for which purpose a rule nisi was obtained.

*740] *The facts appear to be that there was an ancient public bridleway, passing in part through old enclosures, but, as to the greater part, over the common unenclosed lands: an Enclosure Act passed (54 G. 3, c. clx.), under which the Commissioners set out the road as “one public bridle road and private carriage road” for particular persons named, and to be kept in repair by them; and it was set out to be 30 feet in width.

Before the enclosure, the road varied much in width, being much more than 30 feet in some places between old enclosures, and being

(a) Where *Harber v. Rand*, 9 Price, 58, was cited. See *Rex v. The Marquis of Downshire*, 4 A. & E. 698 (E. C. L. R. vol. 31).

undefined in the parts where it passed over the unenclosed lands. No order of justices for stopping or diverting the old road was ever obtained, nor any certificate of justices that the new road was sufficiently made.

It is quite plain that the old road has never been stopped. The new road continues a public bridle road as it was before, except that it has been narrowed in some parts, and defined in others; but the public have the same right of passage as before: and it is plain that the Commissioners had no power under the local act, or under stat. 41 G. 3, c. 109 (the general act then in force), to cast the burthen of the repair of this public road on private individuals.

It is, however, contended for the defendants that the award operated as a diversion of the old public bridle road, and a setting out of a new one; and which it is said the Commissioners had power to do under the 8th & 9th sections of stat. 41 G. 3, c. 109, as interpreted by the Court in the case of *Logan v. Burton*; and, therefore, that the parish are not liable to repair it until justices have certified that it has been sufficiently made.

*The cases cited on the argument relate to roads, public or private, which have been stopped or diverted by the Commis- [741 sioners, or left unnoticed in their award, and so impliedly extinguished and stopped. In this case, however, we are clearly of opinion that there has been no stopping or diverting of the old road; and, so far from being unnoticed in the award, it is expressly set out as a public bridle road.

If the award had said no more, it would be impossible to raise a doubt as to the liability of the parish. But the award sets it out also as a private carriage road for particular persons, and to be kept in repair by them. It is difficult to say what is the effect, if any, of this latter clause in the award: it certainly cannot extinguish the liability of the parish to repair the road as a bridle road; nor ought it to increase their liability so as to compel them to repair it as a carriage road. No doubt there is hardship on the parish at all events, because the road is probably wider than it would be if it were simply a bridle road, and the necessity for repairs will obviously be much increased, if not entirely caused, by the use of it as a private carriage road; and it is difficult to distinguish how much repair must be done by the parish, and how much must be left to the particular persons who have the right of private carriage road, to do, or not, as they may think fit. This hardship and difficulty, however, cannot alter the legal right of the public, or the legal liability of the parish: and we have no doubt that the parish is bound to do such repairs as are requisite to maintain the road as a public bridle road, whatever may be the extent of such repairs.

The rule must be discharged.

Rule discharged.(a)

(a) Reported by C. Blackburn, Esq.

***742] *JOHN WRAY v. WILLIAM CHAPMAN and HENRY SMITH. Feb. 11.**

By the Metropolitan Police Act, 10 G. 4, c. 44, s. 37, all sums adjudged by justices of peace to be paid for any offence against the Act are to be paid to the Receiver of the Metropolitan Police District, who, by sect. 10, is to apply all moneys applicable to the purposes of the Act to payment of salaries, &c., of the police force, and of all other charges and expenses in carrying the Act into execution. By stats. 2 & 3 Vict. c. 47, 2 & 3 Vict. c. 71, and 3 & 4 Vict. c. 84, certain penalties inflicted by magistrates within the Metropolitan Police District are to be paid over to the Receiver, who is directed to pay salaries, expenses, and charges attending the Metropolitan Police Courts, and in carrying the Acts into execution, and to apply the sums which he receives to the purposes of the Act. And the clerks of the magistrates within the district are to keep an account of such fines and penalties, to be rendered to the Receiver quarterly; and the magistrates are to cause the amount to be paid to him. The clerks of the justices of a part of Surrey, within the Metropolitan Police District, for which no Police Court had been established, claimed to deduct from the amount payable to the Receiver the amount of their fees for summonses granted on the application of officers of the police force.

Held: that the clerks were entitled to such fees; but that they were not entitled to deduct them from the amount payable to the Receiver or in any way to recover them from him, the payment of such fees not falling under the description of carrying the Acts into execution.

DEBT for money had and received, and on an account stated. Plea: Never indebted. Issue thereon.

By order of WIGHTMAN, J., the following case was stated for the opinion of this Court.

The plaintiff, since 1st January, 1830, has been the receiver of the Metropolitan Police District, appointed under stat. 10 G. 4, c. 44. The defendants, since 1st August, 1841, have been joint clerks to the magistrates of the Richmond Division in the county of Surrey, such division being a part of the Metropolitan Police District for which no police court has been established.

By sect. 10 of stat. 10 G. 4, c. 44, the receiver under that Act is to receive all sums of money applicable to the purposes of the Act, and to keep an exact and particular account thereof, and is to draw out of the Bank, from time to time, such sums as may be necessary for the payment of the salaries, wages, and allowances to be paid, as thereafter mentioned, to the persons belonging to the police force to be appointed under the *743] said Act, and *also for the payment of all other charges and expenses in carrying the said Act into execution. By sect. 37 it is enacted that every sum which by any justices of the peace shall be adjudged to be paid for any offence against that Act shall be paid to the receiver appointed under that Act, to be by him added to and applied as part of the funds for the purposes of the police under that Act. By stat. 2 & 3 Vict. c. 47, provisions are made for enlarging the Metropolitan Police District; and, by various sections in that Act, different penalties are enacted for offences specified in those sections. Also, by sect. 22, it is enacted that certain sums therein mentioned, and also the moneys accruing from "fines imposed on any of the said constables for misconduct, and from any portion of the fines imposed by any magistrate upon drunken persons, or for assaults upon police constables, as

shall be directed to be paid to the receiver for the benefit of this fund," "shall from time to time be invested in Government stock by and in the name of the receiver, and the interest and dividends thereof, or so much of the same as shall not be required for the purposes hereinafter mentioned, shall be likewise invested in such stock, and accumulate so as to form a fund to be called 'The Police Superannuation Fund,' and shall be applied from time to time for payment of such superannuation or retiring allowances or gratuities as may be ordered by the Secretary of State at any time to any of the said constables as hereinafter provided." By sect. 75 it is enacted, "that in the construction of this Act the word 'magistrate' shall be taken to mean and include every justice of the peace appointed to be a magistrate of the Police Courts of the Metropolis, and also every justice of the peace acting *in [744 and for any part of the Metropolitan Police District for which no police court shall be established. By sect. 76 it is enacted: "that every such magistrate shall be empowered summarily to convict any person charged with any offence against this Act, on the oath of one or more witnesses or by his own confession, and to award the penalty or punishment herein provided for such offence; and the matter of such complaint shall be heard and determined by one of the justices appointed to be a magistrate of the police courts of the Metropolis at one of the said police courts; or if the offence shall have been committed or the offender apprehended in any part of the Metropolitan Police District for which no police court shall be established as aforesaid, the matter of such complaint may be also heard and determined by any two or more justices acting in and for the county in which the offence was committed or the offender apprehended." Sect. 77 enacts: "that in every case of the adjudication of a pecuniary penalty or amends under this Act, and non-payment thereof, it shall be lawful for the magistrate to commit the offender to any gaol or house of correction within his jurisdiction for a term not more than one calendar month, where the sum to be paid shall not exceed 5*l.*, the imprisonment to cease on payment of the sum due; and the costs for the recovery thereof, and so much of every such pecuniary penalty as shall not be awarded to the informer or other persons who have contributed to the conviction, shall be paid to the receiver of the Metropolitan police for the purposes of this Act; and the residue thereof, under the direction of the magistrate by whom the same shall have been adjudged, shall be paid and applied either to the use of the informer alone or to the use of *such persons as shall have contributed to the conviction of the offender, in such shares and proportions as such magistrate shall [745 think fit." By stat. 2 & 3 Vict. c. 71 (s. 1), certain police courts, therein mentioned and stated to be then established, are continued; and by (s. 2) power is given to the Crown to alter the number of police courts and the number of magistrates appointed to any of them, and

to order changes to be made of the places in which the Courts shall be holden within the Metropolitan Police District; and by (s. 3) to supply the then present and other vacancies among the magistrates of the said courts; and it is enacted that every person so appointed, and also every magistrate then already appointed to the said courts, may act as a justice of the peace of (among other counties and places) the county of Surrey. By sect. 7 it is enacted: "That the receiver of the Metropolitan Police District for the time being shall be the receiver of the said Courts, and shall receive all fees, penalties, and forfeitures, and other moneys applicable to the purposes of this Act, and shall pay quarterly the salaries, expenses, and charges attending the said Courts and in carrying this Act into execution." By sect. 8 it is enacted: "that all the provisions and enactments contained in an Act passed," &c., 10 Geo. 4, c. 44, "relative to the drawing and accounting for moneys which may come into the hands of the receiver of the Metropolitan Police District for the purposes of that Act, and for auditing the accounts and taking security from the said receiver, shall be deemed to extend to the said receiver in respect to all moneys which he shall receive under this Act, as fully as if the same were herein enacted; and with respect to all *746] the powers and liabilities of the said receiver, or anything to be *done by or any contract to be entered into with the said receiver, the execution of this Act shall be deemed one of the purposes of the said Act." By stat. 2 & 3 Vict. c. 71, s. 44, it is enacted: "that all offences committed within the limits of the Metropolitan Police District, which under this or any other Act are punishable on summary conviction before a justice or justices of the peace, may be heard and determined by any of the said magistrates sitting at one of the said police Courts in a summary way," within the time and in the manner there mentioned. By sect. 46 it is enacted: "that the magistrates at each of the said Courts shall take care that one of their clerks shall, in books to be provided for that purpose, keep a full, true, and particular account of all fees taken and received thereat, together with all penalties and forfeitures which shall have been recovered, levied, or received in pursuance of any adjudication, conviction, or order had or made thereat, or any process or warrant issuing therefrom, to which books of account the said receiver shall at all times have free access; and the said magistrates shall, once in every quarter of a year, cause to be delivered to the receiver an account of all such sums received, with all proper vouchers for verifying the same, and shall cause the amount of all such sums to be paid to the receiver, to be applied by him towards the expenses of the said Courts except fines imposed upon drunken persons, or upon constables for misconduct, or for assaults upon police constables, which shall be applied for the benefit of 'The Police Superannuation Fund,' and except also fees for the execution of summonses and warrants, which shall be applied towards defraying

the charge of maintaining the police of the Metropolis." By sect *47, it is enacted: "that where by any Act or Acts any penalties or forfeitures, or shares of penalties or forfeitures, are or [*747 shall hereafter be made recoverable in a summary manner before any justice or justices of the peace, and by such act or acts respectively the same are or shall be limited and made payable to Her Majesty, or to any body corporate, or to any person or persons whomsoever, save the informer who shall sue for the same, or any party aggrieved, in every such case the same, if recovered or adjudged before any of the said magistrates, shall be recovered for and adjudged to be paid to the said receiver for the time being, and not to any other person; but this enactment shall not extend to any penalties or forfeitures recovered under any Act relating to the customs, or to trade or navigation, and sued for by the direction of the Commissioners of Her Majesty's Customs, which shall be paid to such person as the said Commissioners shall direct to receive the same." By sect. 55, it is enacted that the said Act and stat. 10 G. 4, c. 44, and stat. 2 & 3 Vict. c. 47, shall be construed together as one act. Stat. 3 & 4 Vict. c. 84, s. 1, enacts that so much of stat. 2 & 3 Vict. c. 47, as enacts that in the construction of that Act the word "magistrate" shall be taken to include every justice of the peace acting in and for any part of the Metropolitan Police District for which no police court shall be established, and that if any offence against that Act shall have been committed or the offender apprehended in any part of the Metropolitan Police District for which no police court shall be established as aforesaid, the matter of such complaint may be also heard and determined by any two or more justices acting in and for the county in *which [748 the offence was committed or the offender apprehended, shall be repealed. By sect. 6 it is enacted: "that any two justices of the peace having jurisdiction within the Metropolitan Police District shall have, while sitting together publicly in the court or room used for holding special or petty sessions of the peace in any part of the said district within the limits of their commission, except in the divisions to be assigned to the police courts already established, and any two of the justices of the peace for the city of London and the liberties thereof, having jurisdiction within the city of London and the liberties thereof, shall within the said city of London and the liberties thereof have all the powers, privileges, and duties which any one magistrate of the said police courts has while sitting in one of the said courts by" stat. 2 & 3 Vict. c. 47, and stat. 2 & 3 Vict. c. 71, "or either of them."

Quarterly accounts of the fines imposed, under the above-mentioned acts, by two justices of the Richmond Division sitting together publicly in the court used for holding special and petty sessions of the peace for the said division within the Metropolitan Police District, between

31st December, 1843, and 31st December, 1846, and payable to the plaintiff as receiver of the Metropolitan Police District on account of the "Police Superannuation Fund" (subject only to the alleged right of the defendants to deduct the same as hereinafter mentioned), have been duly delivered to the plaintiff as such receiver according to the provisions of stat. 2 & 3 Vict. c. 71, s. 46; and the correctness of all such accounts is certified at the foot thereof by the defendants as clerks to the said justices. The returns are headed:

*749] "Richmond Division in the county of Surrey. Return of fines which have been imposed by the justices during the quarter ending" (here the day, month, and year on which the quarter ends are stated), "and which are payable to the receiver for the time being of the police of the metropolis on account of the 'Police Superannuation Fund,' namely, 'fines imposed upon drunken persons, or upon constables for misconduct, or for assaults upon police constables.' *Vide* Police Acts."

And the certificate at the foot thereof is as follows:

"We certify that the foregoing statement is a just and true account of all fines imposed by the justices of the Richmond Division during the period therein specified, which are payable to the receiver for the police of the metropolis on account of the "Police Superannuation Fund," certified to be correct.

"(Signed) CHAPMAN & SMITH,
Justice." Clerks to the justices."

Also similar accounts for the same period of the fines and penalties imposed under the above-mentioned Acts by two justices of the said division, sitting together publicly in the said court used for holding special and petty sessions of the peace for the said division within the Metropolitan Police District, and payable to the plaintiff as such receiver on account of the "Police Courts Fund," subject only to the said alleged right of the defendants, have been duly delivered to the plaintiff, certified as aforesaid. The returns are headed:

*750] "Richmond Division in the county of Surrey. Return of all fines and penalties which have been imposed by the justices during the quarter ending the" (here the day, month, and year in which the quarter ends are stated), "and which are payable to the receiver (for the time being) of the police of the metropolis on account of the Police Courts Fund in pursuance of any adjudication, conviction, or order had or made by any justice of such district, excepting fines directed to be paid to the 'Police Superannuation Fund,' or penalties recovered under Revenue Acts."

And the certificate at the foot thereof is as follows:

"We certify that the foregoing statement is a just and true account of all fines and penalties imposed by the justices of Richmond Division during the period therein specified, which are payable to the receiver

for the police of the metropolis on account of the 'Police Courts' Fund.' " "Certified to be correct.

(Signed) "CHAPMAN and SMITH,
Justice." "Clerks to the Justices."

The amount of the fines so payable to the plaintiff, subject to the question as to the defendants' claim hereinafter raised, on account of the "Police Superannuation Fund" is 10*l.* 9*s.*

The amount of the fines so payable to the plaintiff, subject as aforesaid, on account of the "Police Courts Fund," is 55*l.* 17*s.*: the said two sums amounting to 66*l.* 6*s.*, the sum for which this action is brought. The said sum of 10*l.* 9*s.* consists of fines imposed for assaults upon constables under stat. 10 G. 4, c. 44. Of the said sum of 55*l.* 17*s.*, 15*l.* are penalties or forfeitures recoverable under stats. 10 G. 4, c. 44, and 2 & 3 Vict. c. 47; 15*l.* are penalties or forfeitures recoverable under stat. 2 & 3 Vict. c. 71; and the remaining 25*l.* 17*s.* are penalties or forfeitures recoverable under other Acts, and the general law of the land.

*The sum of 66*l.* 6*s.* has, before the commencement of this action, been demanded by the plaintiff as receiver of the Metro- [*751 politan Police district, and is claimed by him by virtue of the several provisions of the aforesaid acts of parliament: but the defendants retain, and contend that they are entitled to retain, the said sum as and for and on account of certain fees to which they are justly and legally entitled as clerks to the said justices, for and in respect of certain informations, summonses, warrants, and other proceedings, upon applications made by officers of the metropolitan police to the said magistrates so publicly sitting in the said petty sessions court, arising out of offences created by the said acts, and other offences against the laws of this realm, whereof the said justices have jurisdiction to hear and decide summarily, and which offences are punishable by fine or imprisonment, or by imprisonment in default of paying a fine. These applications for summonses, warrants, and other proceedings were made by the inspector, sergeants or constables of the metropolitan police force, acting under the orders of the Commissioners of Police: and of fees so claimed by the defendants 25*l.* 9*s.* are for proceedings under stat. 10 G. 4, c. 44, and stat. 2 & 3 Vict. c. 47; 15*l.* are for proceedings under stat. 2 & 3 Vict. c. 71; and 25*l.* 17*s.* are for proceedings arising out of offences against other acts, and the general laws of this realm. The fees to which the defendants are thus entitled are the authorized fees of the county of Surrey payable to them by the applicant; and which were duly fixed at the Quarter Sessions for the said county, by virtue of stat. 26 G. 2, c. 14, and afterwards duly allowed by Sir NICOLAS CONYNNGHAM TINDAL and Sir JOHN BERNARD BOSANQUET, Knights, Her *Majesty's justices of assizes for the said county, [*752 on the 9th August, 1841.

The plaintiff contends that he, as receiver, is entitled, under the afore said provisions, to the whole of the said sum, and not liable to pay any fees to the defendants as such clerks as aforesaid. The pleadings in this cause, and also the statutes 10 G. 4, c. 44, 2 & 3 Vict. c. 47, 2 & 3 Vict. c. 71, 3 & 4 Vict. c. 84, and 26 G. 2, c. 14, are to be considered as part of this case.

The question for the opinion of the Court is, whether the defendants, as clerks to the said justices, are entitled to retain the said fines, accounts whereof have been so returned by them to the receiver, as for or on account of fees to which they are legally entitled as aforesaid; or otherwise, whether the defendants are entitled to be paid their said legal and accustomed fees by the receiver; or whether they are bound to pay over the same to the plaintiff.

If the Court shall be of opinion that the defendants are entitled to retain the whole amount of the said fees, or to claim back from the said receiver the amount of such fees, then the plaintiff agrees that judgment shall and may be entered against him of *nolle prosequi*, immediately after the decision of this case, or otherwise as the Court may think fit: but, if the Court shall be of opinion that the defendants are not entitled to retain or be paid by the receiver, as such, such fees as aforesaid, then the defendants agree that judgment shall be entered against them by confession for the said amount, or such sum as the Court shall decide upon, immediately after the decision of this case, or otherwise as the Court may think fit.

*753] *T. F. Ellis*, for the plaintiff.—It is intended in this *case to raise two points: 1. Whether police constables, acting in discharge of their duty in making applications to justices of the peace, are liable to pay the clerk's fees: 2. Whether the receiver is liable in any way for these fees. [PATTESON, J.—Neither point arises on the pleadings. The only question on them is whether the clerks have a lien on the money in their hands; and it seems impossible to contend that they have.] The wish of the Commissioners of Police is to have an opinion to guide them on those two points. If the Court should think that, in any way, by *mandamus* or otherwise, the receiver can be made liable to pay the fees claimed by the defendants, the plaintiff would waive all technical objections. [PATTESON, J.—It is very inconvenient to discuss a question which does not arise. *Bovul*, for the defendants, said that the object of both parties in framing the case was to have an opinion for their guidance on these points. By consent of the Court, and at the request of both parties, the argument proceeded.] First: as to the right of the clerks to take fees from police constables. In other words, is a constable to pay the justice's clerk for leave to perform his duty, whenever that duty binds the constable to make an application to a justice? The constable has no interest in the matter; and he is not furnished with any funds out of which to pay the fees. He

is a mere servant of the law, as the clerks themselves are. Secondly: Assuming that such fees are payable, they are not a charge on the funds in the receiver's hands. The fund is appropriated to special purposes. The enactments are set out in the case: in none of them is there any language which can be construed as appropriating the fund to the payment of *clerks' fees. The payment of those fees cannot be considered an expense incurred in carrying the Acts into execution. [*754] Such an expense is merely the providing buildings and other things requisite for working the Acts. The fees incidental to prosecution are incurred in carrying into execution the general law of the land. Where the Legislature has considered the expenses of carrying an Act into execution to involve expenses of prosecution, the language and the organization of the Act have been different from those of the Acts now in question, as under stat. 5 & 6 W. 4, c. 76, where the words of sect. 92, "necessarily incurred in carrying into effect the provisions of this Act," apply to the expenses of a Court, the jurisdiction of which originates in the Act, as was held in *Regina v. Mayor of Gloucester*, 5 Q. B. 862 (E. C. L. R. vol. 48). In the present case the constables, in laying informations before justices, are not carrying out the purposes of the Police Acts, but giving effect to the general law of the land.

Bovill, contra.—The first question is, whether the justices' clerks are to act gratuitously whenever they are called on by a public officer to do so. Justices' clerks are entitled to fees by old usage, confirmed by statute. The clerks in the county of Surrey are, as appears by the case, entitled, by a schedule made under the powers of stat. 26 G. 2, c. 14, to fees from the applicants. What is there to take away that right when a public officer is concerned? It cannot be said that he who applies for a summons is not an applicant because he is a constable. In *Regina v. Coles*, 8 Q. B. 75, 82 (E. C. L. R. vol. 55), COLERIDGE, J., points out the principle. "Whoever *wants the thing in respect of which the fee is made payable must pay the fee." Then, [*755] as to the second point. The receiver is, by stat. 2 & 3 Vict. c. 71, s. 7, to apply the penalties "in carrying this Act into execution." This casts on him a legal duty, enforceable by mandamus, to apply the penalties to that purpose; and putting a Police Act in execution includes paying clerks' fees; *Regina v. Mayor of Gloucester*.

Ellis was heard in reply.

PATTESON, J.—The intention of the parties is, it appears, to raise two questions for our decision. First: Whether the justices' clerks are entitled to receive fees, at all, from police constables who in the course of their duty apply to them. On that question I entertain no doubt. The clerks of the justices are entitled to fees according to the table of fees made pursuant to stat. 26 G. 2, c. 14. It would, I think, be a most extraordinary thing if the Legislature had by one of the Police Acts (2 & 3 Vict. c. 71, s. 9), secured to the clerks of the police courts large

salaries, of from 500*l.* to 300*l.* a year, and had by any provision, in the same set of Acts, enacted that the clerks of justices, doing the very same duties in other divisions of the very same districts, should receive no remuneration. There is nothing to show that the Legislature had any such intention: and, unless we were to go so far as to say that all constables throughout the kingdom have, when in exercise of their duty, a right to demand the services of the clerks of justices gratuitously, we must say that these clerks are entitled to the fees, according to the table, from police constables. It is rather singular that in stat. 2 & 3

*756] Vict. *c. 71, s. 43, there is a provision authorizing the taking of fees by the police magistrates themselves; those fees are, I suppose, not in practice taken from the police, or this question would not now be raised; but I see nothing in the Act to distinguish between the police and others. That, however, is beside the present point; which is, whether the justices' clerks are entitled to fees from police constables. I think they are so entitled. The next question is, in effect, how the justices' clerks are to obtain payment of those fees. I think that the clerks cannot retain money paid to them as a fine, and apply it to reimbursing themselves fees which ought to have been paid to them and were not: they could do so in no case, unless there were some special enactment enabling them. Then, it is said that a mandamus would lie to compel the receiver to pay them the fees to which they are entitled. That depends on whether we can find any enactment casting a duty on the receiver so to apply the funds. The enactments, directing the receiver to apply the fund to paying the expenses of carrying out the purposes of the police Acts, apply, I think, not to the expenses of conducting prosecutions and the like by policemen, whether for offences under these Acts or under the general law, but to defraying the expenses of the machinery of the police courts created by these Acts. If, then, we cannot apply those words, and there are no others which can apply, what possible remedy can the clerks have against the receiver? Unless the statutes say that the receiver shall pay, no mandamus will lie. Therefore, I answer the question put in the case by saying that the defendants have no remedy against the receiver as such: and judgment must be for the plaintiff.

*757] *COLERIDGE, J.—I am of the same opinion. On the first question, whether the clerks are entitled to receive fees from applicants when those applicants are policemen, my difficulty has been to see any reason for saying they are not so entitled. The administration of justice was in old times always made a source of profit; and in every Court, from the highest to the lowest, fees were payable. The justice of the peace himself did the work, and received the fees. Now the clerk and the justices are different persons; and the clerk receives the fees. His right to do so is at once recognised and regulated by stat. 26 G. 2, c. 14. What, then, is the general duty of the clerk?

Not to act gratuitously, but to act on being paid by the applicant the just and reasonable fee. Then how can the fact, that it is the duty of the policeman to apply, alter the duty of the clerk? The policeman does not cease to be an applicant because it is his duty to apply. Then comes the second question. The clerk not being paid, at the time of the application, the fee due to him, can he recover it from the receiver, or retain it out of the money in his hands which he is to pay to the receiver? At common law it is clear he would have no such right. There is no privity between him and the receiver: his right was to have the fee from a third person, the applicant. Do, then, the statutes give him such a right? It is said they do; because the receiver is to apply the funds for the purposes of the Acts; and it is said that paying these fees is one of those purposes. I think that a strained construction. If it were the true one, I do not see why the receiver should not equally be bound to defray all the costs of *all prosecutions. I think [*758 there is no remedy against the receiver.

ERLE, J.—I am of the same opinion on both points. It seems to me that the clerks of justices in parts within the Metropolitan Police District, but in which no police Court is established, have the same right to receive fees from police constables that the clerks of justices in places out of the Metropolitan Police District have to receive fees from other constables. Stat. 2 & 3 Vict. c. 71, s. 42, in effect declares that such is the law; for we find in that section a very specific enactment, taking away the right to fees from the clerks of justices in parts within the Metropolitan Police District for which police Courts shall be established. That specific provision impliedly recognises the right to fees of the clerks to justices in parts for which no such Courts have been established. I think such clerks have the same right, and may enforce it in the same manner, as the clerks to justices in other parts of the kingdom. Then comes the second question. Now the table of fees points out the applicant as the person who is to pay the fee; and in *Regina v. Coles*, 8 Q. B. 82 (E. C. L. R. vol. 55), my brother COLERIDGE points out the principle: “whoever wants the thing in respect of which the fee is made payable must pay the fee.” The receiver is not connected with the application. There is no enactment, that I can find, which makes it his duty to apply for these things. Is there, then, any ground for saying that there is by any part of the statutes a duty cast upon the receiver to pay the clerks, *so that a mandamus against him would lie? I can find none. I come, therefore, to the conclusion [*759 that the clerks are entitled to these fees, but that they have no remedy against the receiver, nor can they retain them out of the money they are to pay him.

Judgment for plaintiff.(a)

The following case, decided in Hilary Vacation, 1853, may conveniently be added here.

LEVERICK v. MERCER. [*Feb. 5, 1853.*]

Under stats. 27 G. 2, c. 3, 10 G. 4, c. 44, 2 & 3 Vict. c. 47, and 11 & 12 Vict. c. 42, if a prisoner be committed for trial for felony to the county gaol, for an offence committed in the county within the Metropolitan police district, the committal being by a county magistrate within such county and district, and the warrant be delivered to a Metropolitan police constable, a county magistrate may order repayment by the county treasurer to the Metropolitan police constable of the expenses incurred by him in conveying the prisoner to the gaol, the prisoner himself having no funds available for that purpose. And the county treasurer is liable to an action on the case if he refuse to pay under such order.

It makes no difference that the warrant, on the face of it, is directed to the parish constable: because (1) the proper persons to execute it are the Metropolitan police constables; and (2) the treasurer is not authorized to inquire whether the proper constable has executed the warrant, but must obey the order.

So, in the case of a committal for trial for misdemeanor.

So, in the case of summary conviction, and sentence of fine, and imprisonment in default of payment, and committal upon such default, by order under stat. 11 & 12 Vict. c. 43, s. 23.

So, in the case of a remand on a charge of felony or misdemeanor, whether the prisoner is ultimately committed for trial or not.

So, where the warrant of commitment is directed only to the keeper of the county gaol.

So, where the magistrate who issues the warrant is a Police magistrate, sitting in a Metropolitan Police Court, under stat. 10 G. 4, c. 44, 2 & 3 Vict. c. 71.

So, where the magistrate who makes the order on the treasurer is such a Police magistrate.

So, where there is no express direction of the warrant.

So, where the committal is for a refusal to enter into recognisances to appear at Sessions, and to keep the peace in the mean time.

So, where the committal is for further examination, on a charge of felony or misdemeanor, but the prisoner is afterwards summarily convicted of misdemeanor.

But, where a prisoner is remanded for re-examination, and the keeper of the gaol delivers such prisoner to a constable to be conveyed before the magistrates, the constable is not entitled to be remunerated from the county rate for the expense of such conveyance.

Though he would be so entitled if he conveyed him before the magistrate by order of the magistrate.

THIS was an action on the case, brought by a constable of the Metropolitan Police District force against the treasurer of the county of Kent, for the non-payment of divers sums of money respectively ordered to be paid by different orders of magistrates. The declaration contained seventeen counts: but the effect of them will sufficiently appear (a) by *760] the points delivered for the plaintiff. The defendant demurred generally; and the plaintiff joined in demurrer.

Points for the plaintiff.

The plaintiff will contend that the defendant, being treasurer for the county of Kent, and having funds from the county rate, was bound to pay to the plaintiff, being a Metropolitan Police constable, the sums ordered to be paid out of the county rate for the charges incurred by the plaintiff in conveying prisoners to the county gaol (such prisoners having no means of defraying the same) under the circumstances stated in the several counts of the declaration; that is to say:

I. By virtue of an order for payment, made within the county and

(a) The first count is set out in the note at the end of this case.

Metropolitan Police district, by a justice of the county of Kent, not being a Metropolitan Police magistrate:

(Count 1.) Where the prisoner was charged in a parish, wholly within the county and the Metropolitan Police district, before a justice of the county, not being a Metropolitan Police Magistrate, with felony committed in a parish wholly within the county and district, and was committed to the gaol for trial by such justice by a warrant directed to the constable of that parish and the keeper of the gaol, and delivered to the plaintiff.

(Count 2.) Where the charge was of misdemeanor; but the circumstances were otherwise the same as in the first count.

*(Count 3.) Where the prisoner was in the county and district convicted before two justices of the county, not being Metropolitan Police magistrates, of an offence committed in the county and district, and adjudged to pay money, or in default thereof to be imprisoned; and was, in default of payment, committed in the county and district, by warrant of a justice of the county not being a Metropolitan Police magistrate; but the circumstances were otherwise the same as those in the first count. [*761

(Count 4.) Where the charge was of felony, and the prisoner was committed for re-examination, and the charges in question were incurred in conveying him to gaol under that committal, and the prisoner was afterwards committed for trial; but the circumstances were otherwise the same as those in the first count.

(Count 5.) Where the charge was of misdemeanor; but the circumstances were otherwise the same as those in the fourth count.

(Count 6.) Where the circumstances were the same as those in the fourth count, except that the prisoners were afterwards discharged.

(Count 7.) Where the circumstances were the same as those in the fifth count, except that the prisoner was never committed for trial.

II. By virtue of an order for payment made at a Metropolitan Police court, within the county, by a Metropolitan Police magistrate:

(Count 8.) Where the prisoners were charged, at a Metropolitan Police court within the county, before a Metropolitan Police magistrate, with a felony committed within the county and district, and were committed to gaol for trial by such justice, by a *warrant directed to all the Metropolitan Police constables and the keeper of the gaol, and delivered to the plaintiff. [*762

(Count 9.) Where the prisoner was, at a Metropolitan Police court within the county, brought before a Metropolitan Police magistrate for threatening, within the county and district, a breach of the peace, and was adjudged to enter into recognisances, and afterwards was, by the said magistrate at the said court, committed by a warrant, directed to the keeper of the gaol, to appear at quarter sessions,

unless he should enter into the recognisances, and the warrant was delivered to the plaintiff.

(Count 10.) Where the prisoners were, at a Metropolitan Police court within the county, convicted before a Metropolitan Police magistrate, of an offence committed in the county and district, and adjudged to pay money, and, in default thereof, to be imprisoned, and were, in default of payment, afterwards committed by the said magistrate at the said court, by warrants directed to all the Metropolitan Police constables and the keeper of the gaol, and delivered to the plaintiff.

(Count 11.) Where the charge was of felony, and the prisoner, by warrant directed to the keeper of the gaol, was committed for re-examination, and the charges in question were incurred in conveying him to gaol under that committal, and the prisoner was afterwards committed for trial; but the circumstances were otherwise the same as those in the eighth count.

(Count 12.) Where the charge was of misdemeanor, and the warrant was directed to all the Metropolitan Police constables and the keeper *763] of the gaol; but the *circumstances were otherwise the same as those in the eleventh count.

(Count 13.) Where the circumstances were the same as those in the eleventh count, except that the warrant was directed to all the Metropolitan Police constables and the keeper of the gaol, and the prisoner, who was remanded, was afterwards discharged.

(Count 14.) Where the circumstances were the same as those in the twelfth count, except that the prisoners were afterwards discharged.

(Count 15.) Where the prisoner was charged, at a Metropolitan Police court within the county, before a Metropolitan Police magistrate, with a felony committed within the county and district, and was, by such justice, by a warrant directed to all the Metropolitan Police constables and the keeper of the gaol, and delivered to plaintiff, committed for re-examination, and the charges in question were incurred in conveying him to gaol under that committal, and the prisoner was afterwards, on re-examination, convicted by the said magistrate, at the said court, of unlawful possession of property, and sentenced to imprisonment.

(Count 16.) Where the circumstances were the same as those in the fifteenth count, except that the prisoner, on conviction, was sentenced to a fine, which he paid.

III. The plaintiff will further contend that the defendant is liable to pay to him the charges incurred:

(Count 17.) Where the prisoner was charged, at a Metropolitan Police court within the county, before a Metropolitan Police magistrate, with being found in possession of property for which he could not

satisfactorily account, and was by him then committed to *gaol for re-examination by warrant directed to all the Metropolitan Police constables and the keeper of the gaol, and delivered to the plaintiff; and afterwards the prisoner was delivered to the plaintiff by the keeper of the gaol, to be conveyed, and was conveyed, back to the court for re-examination; and the charges in question were incurred in the conveying last mentioned: and an order was made by a Metropolitan Police magistrate for the payment by the defendant to the plaintiff of such charges. [*764]

The case was argued in Michaelmas term, (a) 1852, by *Channell*, Serjt., for the defendant, and *T. F. Ellis*, for the plaintiff. The judgment makes it unnecessary to report the argument.

Cur. adv. vult.

COLERIDGE, J., now delivered the judgment of the Court.

In the first count of this declaration, a magistrate of the county of Kent, not a Metropolitan Police magistrate, is stated to have committed a man in that part of the county which is within the Metropolitan Police district, for an offence alleged to have been committed within that part, to the county gaol. The warrant, directed to the constable of the parish, is delivered by the magistrate to the plaintiff, a Police constable in the district, and is by him executed. Expenses are incurred; and the prisoner has no means of defraying them. These are ascertained by another county *magistrate, who, after ascertainment, makes an order on the defendant, the county treasurer, to pay them; which order is duly delivered to him; and he has county moneys in his hand, out of which they might be paid, but he refuses to do so. The count stating these facts is demurred to. [*765]

It may be taken that, if the offence had not been alleged to have been committed within the Metropolitan Police District, and the plaintiff had only been the parish constable, he would have been clearly entitled to the order for his expenses; and that that order would have issued regularly to the defendant as the county treasurer. (b)

The questions, therefore, will be:—First, does the allegation of the offence having been committed within that district make the order invalid? Second, Does the fact that the warrant, being directed to the parish constable, was delivered by the magistrate to the plaintiff, a Police constable, and executed by him, have that effect?

As to the first question, the Metropolitan Police Act, 10 G. 4, c. 44, does not deprive the magistrates of their ordinary criminal jurisdiction out of sessions within the Metropolitan Police District. The act, therefore, of committal to the county gaol was one which the county magis-

(a) November 16th. Before Lord CAMPBELL, C. J., COLERIDGE, WIGHTMAN, and ERLE, Js., and November 19, before Lord CAMPBELL, C. J., COLERIDGE and ERLE, Js.

(b) As to the law on this point antecedently to stat. 10 G. 4, c. 44, the following authorities were referred to in the argument: 2 Hale, P. C. 96; Fitzh. Abr. *Corone*, 328; stat. 4 E. 3, c. 10; 2 Hale, P. C. 120; stat. 3 Ja. 1, c. 10; stat. 27 G. 2, c. 3; *Rex v. Pierce*, 3 M. & S. 62.

trate had authority to do. So, again, a county magistrate was competent to ascertain and order the payment of the expenses of taking the *766] prisoner there: and this was not seriously contested by my *brother Channell; but he argued that the order was made on a wrong officer and a wrong fund; for that, the offence having been committed within the Metropolitan Police district, the fund properly chargeable was the Metropolitan Police fund, and the receiver for the Metropolitan Police district the officer on whom the order should have been made. (a) This fund and officer were created by stat. 10 G. 4, c. 44, and enlarged by several succeeding statutes, but is not interfered with by stat. 11 & 12 Vict. c. 42, s. 26, under which the order in question purports to have been made.

By stat. 10 G. 4, c. 44, s. 10, the receiver is authorized to defray out of the fund "the salaries, wages, and allowances to be paid," as in the same Act after mentioned, "to the persons belonging to the Police force appointed under this Act, and also" "all other charges and expenses in carrying this Act into execution." The salaries, wages, and allowances here provided for are enumerated in sect. 12, and certainly do not include a case such as that now before us. And it should seem that the only functionaries from whom the receiver is to have orders or directions for payment of money are the Police magistrates, or a principal Secretary of State. And, reading the 10th section with the light thrown on it by the 12th, we think the present case does not fall within the general words of *a charge or expense in carrying the Act into execution*. We certainly see nothing which empowers an ordinary justice of the peace to make any order on the receiver. The Police fund, as mentioned above, has, under several statutes referred to in the argument, *767] *been increased by grants from the consolidated fund; but these statutes make no difference in regard to the matters now under consideration. It is not shown, therefore, that the order is bad in respect of the fund on which it is made, by pointing out any other on which it could properly have been made.

Then, can the order be objected to on the ground that the warrant was badly delivered to the plaintiff, being directed to the parish constable? We think certainly not. By stat. 2 & 3 Vict. c. 47, s. 11, the commissioners of Police are to take care that a sufficient number of Police constables shall be in attendance upon *every magistrate* sitting at any Police court within the limits of the Metropolitan Police district, and at every other criminal court holden within the district, for the purpose of executing such summonses and warrants as may be directed to them. The Police constables, therefore, are to attend, not merely on Police magistrates nor at Police courts, but on every magistrate and at every criminal court within the district. And, as they are to attend for the purpose of executing summonses and warrants, it seems clearly

(a) On this point reference was made to *Wray v. Chapman*, ante, p. 742.

to follow, that they are to attend where persons under charge of felony may be summoned to attend, or committed under warrant to prison. But this is made perfectly clear by the 12th section, which enacts that thenceforward all summonses and warrants to be issued in any criminal proceeding within the Metropolitan Police district, or by any magistrate within the said district, *shall be served and executed* by a Police constable, and by none other. Unless, therefore, this warrant could be lawfully executed by a Police constable, it could not be executed at all. Looking at the *language of the 11th and two following sections, [*768 it may be that it would have been more correct to direct the warrant, not to the parish constable, but to all the Police constables. Still, however directed, it could only be served and executed by a Police constable. A warrant, directed as this, could at common law give the parish constable no authority beyond his own parish; for, being directed to him not by name, but only in his character of officer, its virtue was not measured by the authority of the magistrate granting it, but by that of the officer receiving it; *Rex v. Weir*, 1 B. & C. 288 (E. C. L. R. vol. 8.) The statute 5 G. 4, c. 18, s. 6, however, passed in the year next after this decision, and probably in consequence of it, altered the law, and made the authority of the magistrate the measure of that of the officer to whom the warrant is directed merely as such, and not by name. Even in a case in which the validity of the warrant should come immediately in question, this statute has made the direction of it less important than it was before: and, even in such a case, it might perhaps be held that the magistrate delivering the warrant himself to the plaintiff, directed to the parish constable, who merely as such could not execute it, must be taken to treat the plaintiff as the parish constable *pro hac vice*. But we do not think that this question was one open to the defendant. He had to look to the order on himself, on the face of which there was no irregularity. It would be very inconvenient to hold that a county treasurer, receiving an order of this sort, regular on its face, was bound to inquire into the regularity of all the previous proceedings: was the prisoner duly *conveyed? [*769 has the magistrate duly ascertained the expenses? was the officer conveying the lawful constable of the parish? Unless he was *bound* to see to these and such matters, in order to make his payment under the order a good discharge to himself, it seems obviously more proper to hold that he is not at *liberty* to make any question upon them. The 13th section of stat. 2 & 3 Vict. c. 47, suggests an observation confirmatory of this. That section provides that, where a warrant is directed or delivered to a police constable, unless it be necessary to execute it without delay, he is to deliver it to his superior officer, who shall appoint by endorsement one or more constables to execute it. It surely could be no part of the duty of the treasurer to whom an order was brought for payment to ascertain whether the warrant had been delivered to the

party presenting it; and if so, to inquire why he, and not some other appointee of the superior officer, had executed it.

It was answered indeed, to this line of argument, that the 11th, 12th, and 13th sections of stat. 2 & 3 Vict. c. 47, must be understood as referring solely to Police magistrates acting anywhere within the Metropolitan police district: and, therefore, that the plaintiff must be considered as having been entirely without authority; and that the magistrate was under a mistake, and did what he was not authorized in doing, when he delivered the warrant to him. But there are some very strong reasons against admitting this limitation on the plain meaning of the language used.

In the first place, it is most important that on a subject of this sort the language of the legislature should receive the interpretation which plain common *sense would put on it; for, if the warrant be
*770] delivered to one in whom it is unlawful to execute it, and there be resistance, and death occurs, the gravest questions in the law would arise: and let it be observed that there is nothing so likely to occasion resistance as doubts entertained in regard to the authority of the party holding the warrant.

If, secondly, a magistrate in a case like the present, in order to avoid questions, should adopt the safer course, and in all cases direct and deliver the warrant to all Police constables, and to a Police constable by name, then, according to our clear opinion as to the Police fund, and the argument of the defendant as to the county rate fund, such constable can receive no indemnity for his expenses; for, if he cannot have recourse to either of these two funds, there being no suggestion of any third fund, he must remain unpaid. But this is clearly against the policy of the law, as manifested, not merely by stat. 11 & 12 Vict. c. 42, but by other former statutes. And we may add that it is equally clearly against the policy of good government, which points out that the public agents in the administration of criminal justice should be reasonably remunerated and indemnified by the public; at all events when they cannot be so from the goods of the offender.

We are, therefore, of opinion that the plaintiff is entitled to our judgment on the first count.

And, with a view to the following counts, it may be convenient to state that the short grounds of our opinion are, that this case falls within the general enactments of stat. 11 & 12 Vict. c. 42; that the
*771] Metropolitan Police Acts do not interfere with these, except *in limiting the description of officer to whom warrants should be delivered within the Metropolitan police district; and that this warrant, though directed to the parish constable, was for the present purpose well delivered to the plaintiff: or that, at all events, the order for his remuneration was a valid order on the defendant.

From these grounds it will follow that the plaintiff is also entitled to

our judgment on the second count, in which the only difference is that the offence charged was a misdemeanor: and this is unimportant; for the justice was equally authorized to commit in this case as in felony; and it is upon the committal and the execution of the warrant that the right to the order for the expenses arises.

The third count states a case of commitment on a summary conviction, where the adjudication was in the first instance for a pecuniary penalty and costs, with the alternative of imprisonment in case of non-payment; and the facts stated bring it within stat. 27 G. 2, c. 3, s. 1. Now stat. 11 & 12 Vict. c. 43, with respect to summary convictions and orders, makes no provision for these expenses, though it is full upon the subject of costs to be paid to the opposing party; and the form of commitment in the schedule (O 1.) (a), which is applicable to this, assumes an adjudication extending to these expenses, and in itself extends the imprisonment until these, as well as the penalty and costs, are paid. But then stat. 27 G. 2, c. 3, is not repealed by this statute: and this statute expressly directs (b) the order to be made "when any person, not *having goods or money within the county where he is taken, [772 sufficient to bear the charges of himself, and of those who convey him, is committed to gaol or the house of correction," making no distinction as to the offence for which he is committed. And the treasurer, by the same section, is required to pay the ascertained amount as soon as he receives the warrant; "*and any sum so paid shall be allowed in his accounts.*" It could not be contended, in a case on which the Metropolitan Police Acts had no bearing, that the treasurer could resist this order: and we see no grounds for holding that they do here apply, any more than in the two preceding cases. We think, therefore, our judgment must be for the plaintiff on this as well as on the two preceding counts.

The fourth count of the declaration differs from the first in this respect only, that it states a case in which the magistrate remanded (c) the prisoner under a charge of felony, to be brought up at a day named, for further examination. This makes no difference in principle; and our judgment on this count also will be for the plaintiff.

The fifth count states a commitment for further examination of one William Amos for uttering, and one George Brown for having on his person, counterfeit coin, under a warrant directed only to the keeper of the county gaol, but delivered to the plaintiff for execution: in all other material respects it is the same as the second count; and these circumstances in which it differs raise no ground for a difference in our judgment.

(a) Stat. 11 & 12 Vict. c. 43, s. 23.

(b) Sect. 1.

(c) In the argument, reference was made to 2 Hale, Pl. C. 119, 120; Davis v. Capper, 10 B. & C. 28 (E. C. L. R. vol. 21); Yearb. Hil. 10 H. 4, fol. 7 A, pl. 2.

*773] The same conclusion we come to on the sixth count, *where the committal was for further examination on a charge of felony, and on the subsequent inquiry the prisoners were discharged. The result of the inquiry can of course have no effect on the plaintiff's right to recover.

The same remark applies to the seventh count, which is similar to the fifth count, except that the remanded prisoner was never finally committed for trial.

Thus far, the counts all state commitments by county magistrates, not of the Metropolitan Police, sitting within the Metropolitan Police district but not in a Metropolitan Police court, the warrants directed to the parish constable, but delivered to the plaintiff, the orders on the defendant made by county magistrates, not of the Metropolitan Police. We are now to consider cases in which the warrants for committal were made by Metropolitan Police magistrates sitting in Metropolitan Police courts within the district, directed to all the Police Constables, and delivered to the plaintiff, or only delivered to him without any direction expressed on their face, and the orders on the defendant for payment also made by Metropolitan Police magistrates: and nine several counts are framed on cases of committals, respectively, for trial on charges of felony; for refusing to enter into a recognisance with sureties to appear at the sessions and meantime to keep the peace and be of good behaviour; on summary convictions for assaults; for further examination on a charge of felony, followed by a commitment for trial; for further examination on a charge of misdemeanor followed also by a commitment for trial; for further examination on a charge of felony, followed by a discharge on such further examination; for further examination *774] on a *charge of misdemeanor, followed by a discharge; for further examination on a charge of felony, followed by a summary conviction of misdemeanor; and, lastly, for further examination on a charge of an indictable misdemeanor followed by a summary conviction of one by statute, punishable summarily, and adjudication of a fine, paid by the prisoner.

We have specified the different grounds of committal, and the results, because it must be presumed that the defendant thought these matters might be material: but it will be observed that they are either the same as those which have been dealt with in one or other of the first seven counts, or the differences arise after the title of the plaintiff, if any, to be remunerated has arisen, and cannot, therefore, affect it. We have noticed also the direction of the warrants; but this also is a point which we have already considered in our judgment on the earlier counts. So that the material points for consideration in respect of these nine counts are: that the warrants of committal, and the orders for payment, were made by Metropolitan Police magistrates, either sitting in Metropolitan Police courts, or at least directly acting as such.

Now, under stat. 10 G. 4, c. 44, these magistrates are appointed justices for the whole county as well as the Police district; they are to discharge the duties of Justice of the peace, some at least of them, both at the Police office and in all parts of the county. (a) The argument, therefore, for the defendant must be founded, not so much on a want of relation between these magistrates and himself, or a want of power in them generally, but that they have made their orders on the *wrong fund, because the cases out of which the charges grew [*775 arose within the Police district, and came before them in the Police courts, or at all events they have made them on a fund not liable. The Police magistrate, if acting as a county magistrate out of the district, or even in it but out of his court, certainly might, by virtue of his general authority as a county magistrate, make the same orders as an ordinary county magistrate might make, in all cases within the exception at the close of the 1st section of stat. 10 G. 4, c. 44. As to all such he is a county magistrate, and something more: he has all general powers as an ordinary justice of the peace; and he has also special powers as a police magistrate. The exception referred to is in these words: "for the preservation of the peace, the prevention of crimes, the detection and committal of offenders, and in carrying into execution the purposes of this Act." A Police magistrate, therefore, may act out of sessions in matters concerning the detection, or the committal, of offenders, and in carrying into execution the purposes of the Act. We think this language, fairly interpreted, extends to warrants and orders such as we are now dealing with. The Police magistrate cannot discharge his duty as such without committing offenders (under which term persons charged with offences must in reason be included) to the county gaol: the committal can only be carried into effect by an agent; that agent must be a Police constable; the Police constable must be indemnified for the expense necessarily incurred; he cannot be expected to defray it out of his wages or ordinary allowances; and such indemnity can only be ascertained and awarded by a magistrate. We think, therefore, that *the Police magistrate has *necessarily* the power [*776 to make an order on *some fund*. Then, is the Metropolitan Police fund that on which the order is to be made? To answer this, we must refer to stat. 10 G. 4, c. 44, s. 12. Now the only power which the Police magistrates have over that fund, by that section, is for any extraordinary expenses which shall appear to have been necessarily incurred in apprehending offenders and executing orders of Police magistrates, such expenses being first examined and approved by one of the said Justices. Such orders as we are now considering clearly do not fall within the first branch of this sentence: nor do they within the second; for this, like the former, only extends to *extraordinary expenses*, not to such as must occur in almost every case of committal;

(a) See, further, stat. 2 & 3 Vict. c. 71.

and, if it had been intended to include expenses of conveyance under ordinary warrants of committal, we should have expected to find, not merely the word "orders," but "warrants," made use of. Looking at the whole section, it is clear to our minds that this part of it was intended only to provide for those extraordinary occasions which from time to time arise in the discharge of the duties of the Police properly so called, and had no reference to the daily duties of magistrate and constable.

We are, then, brought to the conclusion that the Police magistrate has power to make the orders in question on some fund, but not on the Police Fund. None other can be suggested but the County Fund; and the general words of stat. 11 & 12 Vict. c. 42, taken in conjunction with those of stat. 10 G. 4, c. 44, are large enough to include Police as well as county magistrates.

*777] We think, therefore, that on these nine counts also judgment should be for the plaintiff. And this conclusion works no injustice. The parishes in a county, which are included within the Police district, contribute as well to the county rate as to the Police rate: expenses incurred by the conveyance of their offenders may, therefore, properly be borne by the county rate.

We have but one count remaining to be disposed of; in which it is stated that, the plaintiff having under a warrant conveyed a prisoner to the county gaol on remand for further examination, and the keeper of the gaol having received a warrant to bring the prisoner up again for examination, the plaintiff, at the request of the gaoler, received her *from him*, and conveyed her before the magistrate; and the order on which he seeks to recover is for the expense of so reconveying her. No statute was urged which authorized any such order; nor have we found any. By sect. 21 of stat. 11 & 12 Vict. c. 42, the power of remand is given to the justice, for not exceeding eight clear days, to the common gaol or House of Correction; or for not exceeding three clear days to the custody of the constable himself, in whose custody the prisoner previously was. If the latter course be adopted, the justice may order the constable to bring the prisoner before him; but no express provision is made in the former case for the bringing the prisoner up again. The statute, however, in general terms, provides that the justice of the peace may "order such accused party to be brought before him," or any other justice, "at any time before the expiration of the time for which such accused party shall be so remanded," and, then, that "*the gaoler or*
*778] *officer in whose custody he shall then be shall duly obey such order.*" We do not think these last words necessarily put the officer and gaoler on the same footing, so as to make it proper for the magistrate to order the gaoler to bring up the prisoner: and the practice would be so full of inconvenience that we think it ought not to be adopted. It seems to us that the words of the statute would be fully

satisfied if we hold them only to make it the duty of the gaoler to give up the prisoner to the officer who should bring the order of the magistrate for that purpose: and, if the magistrate made his order to the constable to bring him up at the same time that he orders the gaoler to deliver him, it would not be putting too large a construction on the words of the 26th section if the constable's expenses in obeying that order should be certified for as part of the entire expenses of the whole committal. But this course has not been adopted here; and clearly the constable is not under the gaoler's authority for this purpose; nor had this last any authority to make any such order as is here relied on. On this count judgment must be for the defendant.

We have, as requested, gone fully into all the various points which this case embraced; and our judgment will be for the plaintiff on all the counts but the last; on which it will be for the defendant.

Judgment accordingly.

The first count of the declaration (see p. 759, ante) charged:

"For that, whereas heretofore, and after the passing of a certain Act of Parliament made," &c. (11 & 12 Vict. c. 42, "to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales, with respect to persons charged with indictable offences"), "and after the 1st day of October, A. D. 1848, to wit, on the 7th day of October, A. D. 1850, before Viscount Sydney, then being one of the justices of our Lady the Queen assigned to keep the peace of our said Lady the Queen in and for the county of Kent, and to *hear and determine divers felonies, trespasses, and misdemeanors in the same county committed, one Stephen Malloy was, in that part of the said county of Kent which is within the metropolitan police district, charged, on the oath of one William Cheeseman, of Bexley in the said county, for that the said Stephen Malloy, on the 5th day of October then instant, at the parish of St. Mary Cray, in the said county, one waistcoat, of the value of 5s., of the goods and chattels of the said W. Cheeseman, feloniously did steal, take, and carry away; and thereupon, in a reasonable time in that behalf, afterwards, to wit, on the said 7th day of October in the year last aforesaid, the said Viscount Sydney, as and then being such justice as aforesaid, did, in that part of the said county of Kent which is within the said metropolitan police district, issue his warrant under his hand and seal, directed to the constable of the said parish of St. Mary Cray in the said county (the whole of which same parish, at the time of the supposed committing of the same supposed offence, and from thence until and at the time of the issuing of the said warrant was a parish within the said metropolitan police district), and to the keeper of the common gaol at Maidstone in the said county; and thereby, after reciting that the said Stephen Malloy was so charged as aforesaid, commanded the said constable to take the said Stephen Malloy, and him safely to convey to the common gaol at Maidstone aforesaid, and there to deliver him to the keeper thereof, with that warrant; and thereby also the said Viscount Sydney, as and then being such justice as aforesaid, commanded the said keeper of the said common gaol to receive the said Stephen Malloy into his, the said keeper's, custody in the said common gaol, and there safely keep him until he should be delivered by due course of law: and the said Viscount Sydney, as and then being such justice as aforesaid, then, in the said county and in the metropolitan police district, delivered the said warrant to the plaintiff, to be executed in due form of law, he, the plaintiff, then, and from thence until and at the time when he delivered the said Stephen Malloy as hereinafter mentioned, and at all the times hereafter mentioned, respectively, being one of the police force for the metropolitan police district, to wit,

a constable of the metropolitan police force, duly appointed under and according to the provision of the Act of Parliament made," &c. (10 G. 4, c. 44, "for improving the police in and near the metropolis"); "by virtue of which said warrant the plaintiff, as such constable as aforesaid, in a reasonable time afterwards, to wit, on the 7th day of October, A. D. 1850, did, in the said county of Kent, take the said Stephen Malloy, and him safely convey to the said common gaol at Maidstone aforesaid in the said county, and there deliver the said Stephen Malloy, together with the said warrant, to Joseph Bone, then being the keeper of the said common gaol at Maidstone aforesaid, and who thereupon gave to the plaintiff, in a form to the like effect as the form referred to in the said first-mentioned Act by the letter and figure following.

*780] that is to say, T. 2, a receipt for the said Stephen Malloy, setting forth the *state and condition in which the said Stephen Malloy was when he was so delivered into the custody of the said J. Bone: and whereas the said Stephen Malloy had not, at any time, from the time when he was so taken by the plaintiff as aforesaid to or at the time when he was so delivered by the plaintiff as aforesaid, or at any other time, goods or money within the said county of Kent sufficient to bear the charges of himself, the said Stephen Malloy, and of the plaintiff who so conveyed him, or any part thereof: and whereas, by reason of the premises, the plaintiff became and was entitled to his costs and expenses for so conveying the said Stephen Malloy to the said gaol as aforesaid: and thereupon afterwards, to wit, on the 30th day of December, A. D. 1850, in the said county of Kent, Coles Child, Esq., as and then being another of the said justices of the peace in and for the said county of Kent, did ascertain the sum which ought to be paid to the plaintiff, for so conveying the said Stephen Malloy to the said gaol, to be the sum of 1*l*. 7*s*. 9*d*., and did thereupon then, in the said county, according to the form of the first-mentioned Act of Parliament, make an order upon and directed to the defendant, as and then being the treasurer of the said county of Kent, the said order being in a form to the like effect as the form referred to by the first-mentioned Act by the said letter and figure T. 2; and by which said order the said Coles Child then ordered the defendant, as such treasurer as aforesaid, to pay to the plaintiff, as such constable as aforesaid, the said sum of 1*l*. 7*s*. 9*d*., according to the form of the statute in such case made and provided: and, although afterwards, and before the commencement of this suit, to wit, on the day and year last aforesaid, the plaintiff produced and presented the said order to the defendant, then being such treasurer as aforesaid, for payment, and although the defendant, when the said order was so produced and presented to him as aforesaid, had in his hands, as such treasurer, sufficient money of the said county, arising out of the county rate of the said county, wherewith he could and might have paid to the plaintiff the said sum of 1*l*. 7*s*. 9*d*.: yet the defendant, disregarding his duty and the statute in such case made and provided, did not, nor would, at any time pay the said sum of 1*l*. 7*s*. 9*d*., or any part thereof, to the plaintiff, but neglected and refused so to do: contrary to the form of the statute in that case made and provided.

*STROUGHILL v. BUCK. Feb. 13.

[*781]

By indenture between plaintiff and defendant reciting, *inter alia*, that defendant had advanced money to O. on the security of certain deeds, and that defendant was interested in those deeds to that extent, and that it had been agreed that plaintiff should make further advances to O., and that defendant should assign the deeds and his interest therein to plaintiff as a security, defendant assigned them to plaintiff, and covenanted that the money so advanced to O. by defendant was due and unsatisfied to him.

In an action on this deed, assigning as breach that the money was not due at the time of making the covenant:

Held, that the recital, that the money had been advanced, was to be taken as the language of the defendant only, and did not estop the plaintiff from saying that it had not been advanced. Where a recital is intended to be an agreement of both parties to admit a fact, it estops both parties; but it is a question of construction whether the recital is so intended.

COVENANT. The declaration made profert of an indenture, of 29th June, 1848, made between defendant of the first part, Richard Batley of the second part, and plaintiff of the third part, reciting, *inter alia*, a bond for 2000*l.* dated 31st July, 1846, made by one Ogle to Batley, for securing to Batley all such sums as he should advance as manager of improvements then contemplated on Ogle's estate, not exceeding 1000*l.*; a warrant of attorney, dated 1st August, 1846, and a judgment of the Common Pleas entered up in pursuance thereof, on 4th August, 1846, as a further security to Batley: reciting also articles of agreement of 1st August, 1846, between Ogle of the first part, Batley of the second part, and defendant of the third part, by which articles (after stating an advance by the defendant to Batley with the privity of Ogle, of 100*l.* for the purpose of being applied to the improvements, and a contemplated advance from time to time by the defendant to Batley of other sums for the same purpose, on the security of an assignment of the bond and judgment) Ogle and Batley covenanted not to do anything to the estates without the defendant's consent: reciting also a deed of 1st August, 1846, whereby they assigned the bond, warrant of attorney, and judgment to defendant as a security for such sums as should be so advanced by defendant for that purpose; *and covenanted with defendant to pay such sums: "and also therein" [*782 (in the indenture declared upon) "and thereby further reciting that the defendant had, since the date of the said indenture of assignment, from time to time advanced, for the purposes therein recited, various sums amounting in the whole to 269*l.*, and which were still owing to defendant, with interest thereon, upon and by virtue of the said recited security, and that defendant was interested in the said bond, warrant of attorney, and judgment to the extent of the said amount:" and further reciting that plaintiff advanced to Ogle 200*l.*, and that it was agreed, on the treaty for such advance, between the plaintiff, the defendant, and Ogle, that defendant should on request assign to plaintiff all defendant's interest as aforesaid in the bond, warrant of attorney, and judgment, as a security to plaintiff for such advance. The decla-

ration then stated that defendant, by the indenture declared upon, assigned to plaintiff the bond, warrant of attorney, and judgment, and all interest, power of suit, &c., of defendant therein, and in the said articles of agreement and assignment, upon trust in the first place, out of the moneys to be realized thereby, to retain for plaintiff the said sum of 200*l.* with interest, and then upon trusts for the benefit of defendant, Batley, and Ogle. Covenants by defendant with plaintiff, amongst other things, that the 269*l.* then was and remained due and owing and unsatisfied and payable upon and by virtue of the therein-before recited securities.(a) Breach, that defendant had not since the date of the indenture of assignment, or at any other time, advanced *783] for the purposes therein recited the sum of 269*l.*, or any part thereof; nor was the same, or any part thereof, at the time of making the covenant, owing to defendant upon those securities; nor was defendant then or ever since interested in the said bond, warrant of attorney, or judgment to that amount, or any part thereof; nor did the said amount, or any, remain, at the time of the covenant, due or owing, or unsatisfied or payable by virtue of the said bond, &c.

Plea 2 is omitted; see *infra*. There was a special demurrer to this plea, and joinder in demurrer.

Plea 4. That the said sum of 269*l.*, advanced as in the deed recited, had not been paid or satisfied to defendant, or discharged by any matter subsequent to the date of the indenture: conclusion to the country. Special demurrer, assigning as cause that the plea did not answer the breach. Joinder.

The demurrers were now argued.(b)

G. T. White, for the plaintiff.—The pleas are both bad. (*Bovill*, for the defendant, admitted that the second plea was bad, but said he should contend that there was an estoppel apparent on the face of the declaration, precluding the plaintiff from setting up anything inconsistent with the truth of the recital in the indenture declared upon, and that consequently the fourth plea answered all that part of the breach on which the plaintiff could rely.) If the recital in the indenture were the plaintiff's recital, it might be argued that it estopped him: but it is the language of the defendant. Such a recital amounts to a covenant by defendant to plaintiff that the money had been advanced, not to an agreement between plaintiff and defendant that it should be considered *784] as advanced: consequently *it is no estoppel on the plaintiff; *Edwards v. Brown*, 3 Y. & J. (Exchequer) 423,† *Young v. Raincock*, 7 Com. B. 310, 338 (E. C. L. R. vol. 62).

Bovill, *contra*.—*Edwards v. Brown* was the case of a bond; and the obligee could not be estopped by the recital in the obligor's deed. There is a great distinction in this respect between a deed poll and a

(a) See also the statement of this indenture in the judgment, pp. 787, 8, post.

(b) Before PATTERSON, COLERIDGE, and ERLE, J.

deed indented. "The deed indented is the deed of both parties, and therefore as well the taker as the giver is concluded;" Co. Litt. 363 b. The parties to this indenture must be taken to have satisfied themselves at the time that the money had been advanced for these purposes, and made their bargain on the mutual understanding that such was the fact. The recital is put into the indenture in order that the defendant may not be called upon at any future time to prove, not only that the money was advanced, but that it was advanced for these special purposes. Such a recital estops both parties. In *Young v. Raincock* the Court, in their judgment, say: "It seems clear, that, where it can be collected from the deed, that the parties to it have agreed upon a certain admitted state of facts as the basis on which they contract, the statement of those facts, though but in the way of recital, shall estop the parties to aver the contrary." [ERLE, J.—I have no doubt that a recital by one party of a state of facts on the faith of which the other party was induced to enter into the contract is an estoppel in favour of the party who entered into the contract on the faith of them. But such a recital does not estop in favour of third persons who did not contract on the faith of it; *Carpenter v. Buller*, 8 M. & W. 209.† I think there is a distinction kept in mind, throughout the *judgment on this [*785 point in *Young v. Raincock*, between recitals on the faith of which the other party contracts and other recitals. Is there any case in which a recital by one party of a fact within his own knowledge, on the faith of which the other party contracted, has been held to estop the latter in favour of the former?] The present case does not require so much. But, if such an authority be required, *Bowman v. Taylor*, 2 A. & E. 278 (E. C. L. R. vol. 29), seems to go the full length. There, by an indenture containing a recital that Bowman had made an invention and obtained letters patent therefor, and had enrolled a specification, Taylor agreed with Bowman to pay him for the use of such patent right; and it was held that this recital of Bowman's right estopped Taylor from saying that Bowman was not the inventor, or that there had not been a specification enrolled. The recital, that a specification had been enrolled, was as much Bowman's recital as the recital that the money had been advanced in the present indenture is the defendant's. [ERLE, J.—*Bowman v. Taylor* may be supported on a different principle, though I do not say that the judgment in that case proceeded upon it. When I was in the Common Pleas, there was a case before us on an assignment of a patent right, where we had to consider the question, though it was not necessary to decide anything on it. We were all, I think, much inclined to say that, whilst the assignee enjoyed, or might, if he pleased, enjoy, de facto, the thing for which he had bargained, there was an estoppel analogous to that of a tenant of land; but that, if the patent were avoided, so that the assignee was in a condition analogous to that of a tenant after eviction, the estoppel would cease

*notwithstanding the recitals in the indenture.] Beckett v. Bradley, 7 M. & G. 994 (E. C. L. R. vol. 49), seems an authority for saying that a recital of the plaintiff's title in an indenture estops the defendant. [ERLE, J.—That also was a case analogous to a demise; and the defendant had the thing bargained for. A recital in an indenture may be the language of both parties, so as to estop both: but the recital in the present instance seems the language of the defendant only, unless you can show it to be law, that a recital in a deed indented must be taken to be the language of both parties.] Young v. Raincock seems a case in which the recital was the language of one party only, if that be the principle: yet the Court of Common Pleas apparently thought there would have been an estoppel if the defendant had relied upon it. [PATTESON, J.—That cause was tried before me. I thought that the recital was the defendant's language, and that, even if it had been pleaded, there was no estoppel as against the plaintiff; but, as there was a distinct issue upon it, the question was open for the jury, even supposing that, if pleaded, it would have been an estoppel. As the recital was the language of the defendant, I thought it was not of great weight as evidence against the plaintiff; and so I told the jury, who found for the plaintiff. The Court of Common Pleas considered this right.]

White was heard in reply.

Cur. adv. vult.

PATTESON, J., on a later day in the vacation (February 26th), delivered judgment.

*787] It was argued for the defendant that either the 4th *plea would be good, or the declaration bad, if the plaintiff was estopped in the manner alleged: and it was admitted that, if there was no such estoppel, the 2d and 4th pleas would be bad.

When a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But, when it is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the instrument. All the cases were brought forward and considered in *Young v. Raincock*; and we have no doubt that the result of them is as above stated.

The deed declared on, dated June, 1848, is stated to recite several instruments, viz.: a bond given July 31st, 1846, by Ogle to Batley, to secure advances made and to be made by Batley on Ogle's account for the purpose of improving his estates, and a warrant of attorney dated August 1st, 1846, for the same purpose, on which judgment was entered on the 4th August, 1846: and an agreement of the date of the 1st August, 1846, between Ogle, Batley, and the defendant, for advances contemplated to be made by the defendant to Batley for the same purpose, and to be applied by Batley as an advance under the said bond, and for not doing anything in respect to the estate without the defend-

ant's consent: and a deed of assignment of the same date by Batley to the defendant of the bond and warrant of attorney, in which deed Batley covenanted to repay to the defendant the advances that he might make: also the facts, that the defendant, after the above-mentioned assignment, *advanced 269*l.* for the same purpose (this being the [*788 recital in question), and that this sum was still owing upon the said security: and that the defendant was interested in the said bond, warrant of attorney, and judgment to that amount: that the plaintiff, on 20th November, 1846, advanced to Ogle 200*l.*; and that, on the treaty for this advance, the defendant agreed to assign his interest as aforesaid in the bond, warrant of attorney, and judgment to the plaintiff to secure his advance: and that, by memorandum dated 20th November, 1846, he had agreed to execute an assignment when called on. The deed is then stated to witness that the defendant did thereby assign to the plaintiff the bond, warrant of attorney, and judgment, and the full benefit of them, and of the assignment of them to the defendant, and did covenant that the defendant had neither done nor omitted any act by which the said securities or any estate or interest therein should or might be in any manner affected, otherwise than as appeared by the instrument in question, and that 269*l.* remained due upon the securities to the defendant.

In an action for a breach of this covenant, alleging that the defendant had not made any advance, and that no part of the 269*l.* was due to the defendant at the time of the making of the indenture on which the action is brought, nor was defendant interested in the bond, warrant of attorney, and judgment, the defendant raises the question, whether the plaintiff is estopped from denying that the defendant had made any advances. This we decide in the negative; for, as this fact was material for the validity to the plaintiff of the securities on which he advanced his money, and as he took the covenant of the defendant to secure to him the truth of this fact, we think the true construction to be *that the recital in question was intended to be the state- [*789 ment of the covenantor only. Our judgment is therefore for the plaintiff.

Judgment for plaintiff.(a)

(a) Reported by C. Blackburn, Esq.

A party who has executed a deed is thereby estopped from denying not only the deed itself, but every fact which it recites: *Stowe v. Wyce*, 7 Conn. 214; *M'Donald v. King, Cox*, 432; *Milliken v. Coombs*, 1 Greenl. 343. Neither party to a deed of bargain and sale is estopped to show that one of the bargainors was a *feme sole*, although the deed recites that she was covert: *Brinegar v. Chaffin*, 3 Devereux, 108. The grantor in a deed poll, and all who claim title under the deed, are bound by recitals in the deed, but are not precluded from showing

that a deed so recited is defective and void: *Blake v. Tucker*, 12 Verm. 39; *Kinsman v. Loomis*, 11 Ohio, 475. Where a party to a written agreement recites therein as a consideration that the other party had made a certain conveyance, of even date with the agreement, he is estopped to show in avoidance of the contract, that such conveyance was not made until afterwards: *Dyce v. Rich*, 1 Metcalf, 180; see *Taggart v. Stanberry*, 2 M'Lean, 543; *Inskip v. Shields*, 4 Harrington, 345; *Joeckel v. Easton*, 11 Missouri, 118; *Goodwin v. Kensett*, 1 Smith, 126.

The QUEEN v. STACEY. Feb. 14.

On appeal against a certificate given under stat. 6 & 7 Vict. c. 36, to exempt a Literary Society from rates, the Sessions quashed the certificate by an order reciting that, "Whereas A., of," &c., "in the parish of B., presented his petition and appeal, setting forth that by a certain certificate" he, "as a parishioner and ratepayer of the said parish," in which the society was situate, "conceived himself aggrieved." The order was removed by certiorari, and a rule obtained to quash it, on affidavits that the Sessions had decided erroneously on a preliminary objection.

Held, that it was not competent to raise such a question in this form.

Held, also, that it sufficiently appeared by the order that the appellant was assessed to rates from which the Society was exempted; and that the order was good on the face of it.

PARRY, in last Easter term, obtained a rule nisi to quash the following order of Quarter Sessions, brought up by certiorari:

'London. At the General Quarter Session of the peace," &c. "Whereas at this present session Edward Lane, of No. 6, Aldersgate Street, in the parish of St. Botolph without Aldgate, in the city of London, hath presented his petition and appeal, setting forth that by a certain certificate, dated the 27th day of September, 1843, under the hand of John Tidd Pratt, Esquire, the Barrister at Law appointed to certify the rules of Friendly societies in England, Wales, and Berwick upon Tweed, (a) did certify that the City of London Literary and Scientific Institution was entitled to the benefit of an act passed," &c. (6 & 7 Vict. c. 36, for exempting from rates land and buildings occupied by Literary and Scientific Societies); "by which said certificate the petitioner, as a parishioner and ratepayer of the said *parish of," &c., *790] "in which parish the said Institution called," &c., "is situated, conceived himself aggrieved, and humbly appealed against the said certificate of the said J. T. Pratt: now, upon hearing the said petition and appeal of the said E. Lane against the said certificate, in the presence and hearing of all parties concerned, and having heard what could be alleged on either side by the said parties, their counsel and witnesses, in and concerning the premises, it is ordered that the said certificate of the said J. T. P. be annulled; and the same is hereby annulled accordingly: and that the said appeal be allowed; and the same is hereby allowed accordingly."

The rule was obtained on affidavit, showing that the Sessions allowed the appeal on a preliminary technical objection, without entering on the merits.

Lush now showed cause.—If the Sessions came to a wrong decision, and erroneously refused to hear the merits, the remedy is by mandamus to hear and determine; not by a certiorari. (He was stopped by the Court.)

Parry, contra.—The order of Sessions was quashed in *Rex v. Ridgway*, 5 B. & Ald. 527 (E. C. L. R. vol. 7). [PATTESON, J.—There the Sessions quashed the conviction, subject to the opinion of this Court. Here you seek to impeach the decision of the Sessions on affidavits.]

The order is bad on the face of it. The appeal is given by stat. 6 & 7 Vict. c. 36, s. 6, to any person "assessed to any rate from which any Society shall be exempted by this Act." It does not appear that the appellant Lane was *such a person. The order recites that he appeals "as a parishioner and ratepayer:" but a recital of this [*791 is not enough. It should be found as a fact; *Day v. King*, 5 A. & E. 359 (E. C. L. R. vol. 31). All matters necessary to give jurisdiction ought to appear on an order; *Lindsay v. Leigh*, 11 Q. B. 455, 465 (E. C. L. R. vol. 63).

Lush was then called upon to answer this point.—The rates from which Societies are exempt by stat. 6 & 7 Vict. c. 36, s. 1, are all rates. Then, if it appears that Lane is a ratepayer at all, he is a proper appellant. It is not the practice, in orders of sessions quashing or confirming orders of justices, to adjudicate on the status of the appellant. An order quashing an order of removal never commences by an adjudication that the appellants were churchwardens. It is sufficient that they are described as such, so that the respondent may, if he pleases, deny it.

PATTESON, J.—The order of Sessions states that the appellant, "as a parishioner and ratepayer of the said parish" in which the Institution is situated, conceived himself aggrieved. That is the statement of his petition and appeal to the Sessions. Having his petition before them, they had jurisdiction to entertain the appeal, if he was assessed to any rate in the parish; and I think "ratepayer" is nearly equivalent to assessed to the rates. As all parties were before the Sessions on such a petition, if he was in fact not assessed the respondents might have shown it. I think therefore the order good on the face of it. The objection that the Sessions erroneously decided on a preliminary objection is not properly brought before us.

*COLERIDGE, J.—Enough appears on the order to show that the Sessions had jurisdiction to make it: and that is the only [*792 question we can now consider. The appeal is, by stat. 6 & 7 Vict. c. 36, s. 6, given to "any person or persons assessed to any rate from which any Society shall be exempted by this Act." If those were only specific rates, it might be necessary to show that the appellant was assessed to those specific rates; but by sect. 1 the societies are exempted from all rates. It is therefore sufficient if the appellant was assessed to any rate in that parish. Now the order recites his petition to be that "as a parishioner and ratepayer" he was aggrieved. I think, giving a reasonable intendment to words, this describes him as a person assessed to the rates in that parish.

WIGHTMAN, J.—The first point is not properly brought before us. On the other, it is said that on this order the appellant is not brought within the description in stat. 6 & 7 Vict. c. 36, s. 6, of those to whom an appeal is given, and that he might be a complete stranger. But he

is described as "Edward Lane of No. 6 Aldersgate Street in the parish of St. Botolph;" and he is stated to assert in his petition that "as a parishioner and ratepayer of the said parish" he is aggrieved; and I think, giving a reasonable construction to the order, we must understand that he appeared and petitioned as a person assessed to the rates. It is said that it should be shown on the order that he was a ratepayer, and that it is not enough to show he appeared as one. But I think that the same thing. Both parties appeared; and, of the *793] respondents had objected that the appellant *was not a ratepayer, there was enough on the petition to allow them to make that objection; and then it must have been adjudicated upon.

Rule discharged.(a)

(a) Reported by C. Blackburn, Esq.

The QUEEN v. The Inhabitants of EAST ARDSLEY. Feb. 15.

A pauper lunatic was sent by a justice from the township of A. in the Union of W. to the county Asylum; and the justice made an order upon the treasurer of the guardians of the Union for payment of the expenses. Subsequently, two justices adjudicated that the settlement of the lunatic was not in A., but in township W., also in the same Union of W.; and the two justices, by an order reciting the above facts, ordered the treasurer of the Union, on behalf of such parties as the law required, to pay himself, out of any moneys that might be in his hands, the expenses already incurred on behalf of A.: and likewise to pay the future expenses. Held: That the order was good in substance, as an order was required, under the circumstances, to justify the treasurer in paying as on behalf of W. And that the form, requiring him to pay to himself, as above, was correct.

ON appeal to the West Riding Quarter Sessions, by the guardians of the poor of the Wakefield Union and the overseer of the poor of the township of Wakefield, against an order of two justices, the Sessions quashed the order, subject to the opinion of this Court on a special case.

The case set out the order appealed against. It was addressed to the treasurer of the guardians of the Wakefield Union and to the overseers of the poor of the township of East Ardsley, and to the overseers of the poor of the township of Wakefield, all in the West Riding of Yorkshire. It recited that, on 1st May, 1848, notice was given to Thomas Hague, Esq., a justice in and for the West Riding, by John Allen, relieving officer of the Wakefield Poor Law Union, within which Union the said township of East Ardsley is, that Charles Nalson, a person then chargeable to the said township *of East Ardsley, was *794] then deemed to be insane; whereupon the said justice by order required the relieving officer of the said Union to bring the said Charles Nalson before him or some other justice of the peace of the said West Riding: and that Charles Nalson was brought in pursuance of the said

order before the said justice; and the justice, having called to his assistance E. W., a surgeon, and being satisfied upon view and personal examination of the said Charles Nalson, and on other proof, that the said C. N. was a person of unsound mind, and the said E. W., not being the medical officer of the said Union, having signed a certificate according to the form in the Schedule (E) No. 1, annexed to stat. 8 & 9 Vict. c. 126, that the said C. N. then was a person of unsound mind, by an order under his hand, according to the form in the same schedule, and bearing date 1st May, 1848, directed the said C. N. to be received into the proper lunatic asylum of the said West Riding, within which Riding the said township of East Ardsley is situate. Further recital, that the said C. N. was, in pursuance of the said last-mentioned order, sent and taken from the said township of East Ardsley to and confined in the said asylum, and thence continually had been kept therein at the charge of the said township of East Ardsley. Further recital, that the said C. N. was for the purpose of his settlement to be deemed to be residing in the township of East Ardsley; and that T. H., the justice by whom the said C. N. was sent after the making of the said last-mentioned order, made an order, bearing date 3d May, 1848, upon the Treasurer of the guardians of the Wakefield Union, within which the said township of East Ardsley, from *which the said C. N. was sent to the [*795 said asylum, is situate, for payment to the Treasurer for the time being of the said asylum of the sum of 2s., by the said Justice thereby adjudged to be reasonable charges of the lodging, &c., of the said C. N. in such asylum from the time of his first being placed there to the making of the said order for payment, and also for payment to the Treasurer for the time, from time to time being, of the said asylum of the weekly sum of 7s. 6d. for the then future lodging, &c., of the said C. N. in the said asylum, so long as he should continue there pursuant to the said order in that behalf, or until it should be otherwise ordered in that behalf, according to law.

The order then proceeded: "And whereas, by an order made and bearing date 22d May 1848, under the hands and seals of us, Joseph Holdsworth and Edward Tew, Esquires, two of Her Majesty's justices of the peace," &c., "on the complaint in that behalf of the overseers of the poor of the township of East Ardsley," "we the said last-mentioned justices did ascertain and adjudge," &c.: reciting adjudication that the settlement of C. N. was at the time of the making of the said first-mentioned order, and still, in the township of Wakefield: "And whereas the said township of Wakefield is included in the Wakefield Union; and whereas the expenses incurred by and on behalf of the said township of East Ardsley in and about the examination of the said C. N., and his conveyance," &c., "amount to the sum of 1l. 11s. 8d.; and whereas the sum of 7s. 6d. a week is and during all the time aforesaid hath been a reasonable charge for the past and future lodging, mainte-

nance," &c., "of the said C. N. in the said asylum: and whereas the *796] moneys paid pursuant *to the last-mentioned order in this behalf by the Treasurer to the said Union on behalf of the overseers of the poor of the said township of East Ardsley to the said Treasurer of the said asylum for the lodging, maintenance," &c., "of the said C. N. in the said asylum, and incurred within twelve calendar months next previously to the date hereof, amount to the sum of 1*l.* 3*s.* 7*d.*, including the said sum of 2*s.*: and whereas," &c.: the order then recited complaint by the overseers of East Ardsley to the said justices, and that the overseers of Wakefield appeared before the justices, and, having heard the complaint, failed to give any proof to the contrary: and it proceeded: "Now we, the said last-mentioned justices," "do hereby adjudge that all and singular the said premises are true; and do thereupon hereby order that you the said Treasurer do and shall, on behalf of such parties and in such manner as the law requires, pay to yourself, so being the Treasurer of the guardians of the poor of Wakefield poor law Union in the said West Riding, out of any money which may be in or come into your hands by virtue of your office, the sum of 1*l.* 11*s.* 8*d.*, being the expenses incurred by and on behalf of the said Wakefield Union about the examination of the said C. N. and his conveyance to the asylum as aforesaid, and also the sum of 1*l.* 3*s.* 7*d.*, being the moneys paid as aforesaid by you the Treasurer of the said Wakefield Union for the lodging, maintenance," &c., "of the said C. N. incurred as aforesaid within twelve calendar months next previously to the date hereof, as aforesaid, on behalf of the said township of East Ardsley. And we," &c., "to the intent that we may provide for the future reasonable *797] charges for the lodging, maintenance," &c., "of *the said C. N., do hereby order and direct you the said Treasurer of the Wakefield Union, out of any money which may be in or come into your hands by virtue of your office, to pay to the Treasurer for the time, from time to time being, of the said asylum weekly and every week from the date hereof so long as the said C. N. shall continue in the said asylum by virtue of the said order in that behalf, the sum of 7*s.* 6*d.* for the lodging, maintenance," &c., "of the said C. N. during such his continuance in the said asylum, or until it shall be otherwise ordered in this behalf according to law. And for your paying the said sum of money and charges herein directed to be paid, this shall be your warrant. Given," &c., 22d May, 1848.

1. The appellant objected at the trial that the order appealed against was bad on the face of it, so far as related to the said sum of 1*l.* 11*s.* 8*d.*, inasmuch as it appeared on the face of the said order that the township of East Ardsley, from which the said Charles Nalson was sent to the lunatic asylum, and the township of Wakefield wherein his settlement was adjudged to be, were at the time of the making of the said order, both in the same poor law Union, and there was a manifest absurdity in the said order requiring the Treasurer of the Union to pay

to himself. The Sessions allowed this objection, subject to the opinion of the Court of Queen's Bench in that behalf.

2. The appellants also objected that the order was bad on the face of it, so far as it related to the weekly sum of 7s. 6d. for the future maintenance, &c., inasmuch as it appeared from the said order that there was still subsisting, at the time of the making thereof, a former *order dated 3d May, 1848, on the Treasurer of the said Union [*798 for the payment of the same weekly sum of 7s. 6d. for the future maintenance, &c., of the said Charles Nalson. The Sessions allowed this objection, subject as before.

3. The appellants also objected that the order appealed against was bad, inasmuch as it appeared upon the face thereof that the said order of 3d May, 1848, therein recited was made upon the Treasurer of the guardians of the Wakefield Union instead of the overseers of the poor of the said township of Wakefield, the order appealed against showing that there were overseers of the poor of the said township of Wakefield. The Sessions allowed this objection, subject as before.

4. The respondents objected that it was not open to the appellants to raise the said last-mentioned objection in the said appeal. The Sessions overruled this objection, subject as before.

1. If the Court of Queen's Bench should be of opinion that the objection first above mentioned was invalid, and that the objection thirdly above mentioned was also invalid, or that such last-mentioned objection was not open to the appellants, then the said order appealed against was to be confirmed, so far as it related to the said sum of 1l. 11s. 8d.; and the order of Sessions, so far as it quashed such last-mentioned part of the said order, was to be quashed.

2. If the Court of Queen's Bench should be of opinion that the objection secondly above mentioned was invalid, and that the objection thirdly above mentioned was also invalid, or that such last-mentioned objection was not open to the appellants, then the said order appealed against was to be confirmed, so far as it relates to the *weekly [*799 sum of 7s. 6d. for the future maintenance, &c.; and the order of Sessions, so far as it quashed such last-mentioned part of the said order appealed against, was to be quashed.

3. If the Court of Queen's Bench should be of opinion that the objection thirdly above mentioned was a valid objection, and was open to the said appellants, then the order appealed against was to stand quashed; and the order of Sessions to be confirmed.

Pashley and Pickering, in support of the order of Sessions.—The order of the two justices was made without jurisdiction. It is clear that no order can be valid, unless authorized by statute. The justices in the present case supposed themselves to be acting under stat. 8 & 9 Vict. c. 126, s. 62. That section, however, is confined to cases in which the parishes or townships are situated in different unions. [COLERIDGE,

J.—Who were to adjudge whether the pauper was settled in the township from which he was sent, or another within the same union? Some one must have power to do that.] It is not meant to dispute that the justices had a right to decide on the settlement; but when they had done that their powers were over. The guardians were then to regulate their accounts for themselves, as in *Regina v. Winsford*, 13 Q. B. 873 (E. C. L. R. vol. 66). Or, if an order was to be made, it should have been on the overseers of the township. [ERLE, J.—Can that be done when the township is in a union? I believe it has once been held *800] that an order made, *ex majori cautela*, on the Treasurer of the guardians, and also on the overseers of the parish, *was not void; but I do not think it has ever been held that the justices have an option to make the order on the overseers alone.] *Regina v. Tyrwhitt*, 12 Q. B. 292 (E. C. L. R. vol. 64), is understood as a decision that the justices have such an option. At all events they cannot, under stat. 8 & 9 Vict. c. 126, s. 62, make such an order as this. By sect. 68, the order is to be enforced by an action at law. That shows that the legislature never contemplated an order on the treasurer to pay himself, which is an absurdity on the face of it.

Hall, *contra*, was not required to argue.

PATTESON, J.—It is not necessary to consider whether the justices had an option to make the order for the lunatic's maintenance on the overseers of the township from which he was sent; for, however that may be, the order which was made on the Treasurer of the guardians of the union was good. The order made by the justice who sent the lunatic to the asylum, in effect, commanded the Treasurer to pay the costs of the lunatic's maintenance and to debit the township of East Ardsley with the payments; and he was bound to continue to do so till otherwise directed by a competent authority. In this state of things, the order appealed against was made by the two justices who adjudged that the lunatic was settled in the township of Wakefield. It directs the Treasurer to exonerate East Ardsley and charge Wakefield, and to do so by paying to himself the money; that means, by debiting the township in his accounts. *801] Something was required to authorize the Treasurer to *do this: and I think, if this order was not necessary, it was at all events reasonable and justifiable.

But Mr. *Pashley* argues that, whether it was justifiable or not, it was not authorized by the statute; and he relies on the provision which makes an action at law one remedy for enforcing an order, as proving that the order cannot be made where the same person is both to pay and receive the money. It is very true that a man cannot be both plaintiff and defendant in an action at law; and therefore, if the order is to relieve the one parish at the cost of another within the same union, it cannot be enforced by action. But there are other remedies by which, if the Treasurer refuses to credit the one parish and debit the

other, he can be compelled to so. The mischief is the same, whether the parishes are within the same union or not; and I see no reason why we should not construe the statute in the same way in either case. This order effects the object of the statute, which I think could not be effected without such an order. I am therefore of opinion that the Sessions were wrong in quashing it.

COLERIDGE, J.—It is utterly impossible to construe a statute worded as stat. 8 & 9 Vict. c. 126 is, so as to give a meaning to every word. If we attempted to do so we should make the act insensible. We are to construe sect. 62, not literally, but so as to give it a reasonable meaning. It so happens that in the present case the township in which it is adjudged that the lunatic is settled and that from which he was sent are within the same union, and consequently the Treasurer upon whom the order for payment is to be made is one and the same person with the Treasurer to whom the *payment is to be made, and holds [802 one and the same office; and it is argued that an order on him to pay himself is an absurdity. But the office is one that represents several distinct members of the Union, namely, the different townships of which it is composed. I see nothing absurd in ordering an officer in his character of representative of A. to debit A. with a sum of money, and in his character of representative of B. to credit B. with the same sum: and that is what the order means. It is true that the remedy by action does not apply to such an order; but there are other remedies. I think it no argument against the application of the statute, that all the remedies are not applicable. The case is within the statute, though shorn of that particular remedy.

ERLE, J.—When it was adjudged that the lunatic belonged to Wakefield and not to East Ardsley, it is clear that East Ardsley had a right to be indemnified for past payments, and exonerated from future payments in respect of the lunatic; and it is clear that that was to be at the cost of Wakefield. The law gives no way to relieve East Ardsley and fix Wakefield that I know of, except by an order such as this. The order, therefore, was required. I think also that it is correct in point of form. It directs the Treasurer to pay himself; and that is said to be an absurdity: but it directs him to pay himself “on behalf of such parties and in such manner as the law requires.” If, instead of keeping accounts, the money were kept in specie in separate drawers, he could literally comply with this direction by taking so much money out of the drawer of Wakefield and putting it into that of East Ardsley. *Accounts are not in modern times kept in this rude way; but [803 the treasurer does in effect precisely the same thing by debiting the one party and crediting the other in his books. The order must be construed as directing the treasurer to make such a debit and credit, and is right.

Order of Sessions quashed.(a)

The QUEEN v. WHITMARSH. *Feb. 16.*

A Joint Stock Company provisionally registered under stat. 7 & 8 Vict. c. 110, cannot assume a title denominating it a corporation.

The Court, therefore, refused to compel the Registrar by mandamus to register a proposed change of the name of such Company from The Sea, Fire, &c., Assurance Company, to The Sea, Fire, &c., Assurance Corporation.

The objection on the part of the Registrar may be taken on demurrer to the return.

MANDAMUS to the Registrar of Joint Stock Companies.

"Victoria," &c., "To Francis Whitmarsh, Esquire," &c. "Whereas, on the part of John Hooper and John Wilson, We have been given to understand, in Our Court before Us, that they are the promoters of a certain intended Joint Stock Company, for the purpose of the mutual assurance of shipping and cargoes against the perils of the sea, of General Marine Assurance, of the advancing money by way of loan on shipping, and of commission business in all branches connected therewith, of the usual business of a Ship, Loan, Annuity, and Endowment Society of Mutual Insurance against loss or damage to property by fire, and the business of a Guarantee Association for securing the fidelity of persons in situations of trust; and which said Company is a company within the provisions of an Act passed," &c. (7 & 8 Vict. c. *804] 110, "for the registration, *incorporation, and regulation of Joint Stock Companies"): "And that they, as such promoters, have duly made returns, in the manner directed by the said Act, to the office provided for the registration of Joint Stock Companies, of the proposed name of the said intended Company, the business and purpose thereof, and the names of themselves as its promoters, together with their respective occupations and places of business and places of residence: And that they did in such returns state the name of the said intended Company to be The Sea, Fire, Life Assurance Company: And that, on the 28th day of February last, they received from you, the said Francis Whitmarsh, in pursuance of the said act, a certificate of the provisional registration of the said intended Company under the said name. And whereas, on the part of the said J. H. and J. W., We have been given further to understand," &c., "that they, as such promoters as aforesaid, being afterwards desirous to change the name of the said intended Company from The Sea, Fire, Life Assurance Company, to The Sea, Fire, Life Assurance Corporation, did, on the 27th day of April last, duly make, in pursuance and according to the provisions of the said Act, a return of change in the name of the said intended Company so provisionally registered as aforesaid, from the Sea, Fire, Life Assurance Company to The Sea, Fire, Life Assurance Corporation, and that they did then cause the said return to be taken to the said Registry office: And that you, the said Francis Whitmarsh, were then, on," &c. (27th April), "duly required on the part and

behalf of the said J. H. and J. W. to receive and to register the said return according to the directions of the said Act. Yet that you, the said F. W., not regarding your duty," &c.: *the mandamus [*805 then suggested that Whitmarsh neglected and refused to register the said return, to the damage of Hooper and Wilson, &c. And the writ therefore commanded: That "you do without delay receive the said return of the change in the name of The Sea, Fire, Life Assurance Company, so provisionally registered as aforesaid, and that you do register the change in the name thereof from The Sea, Fire, Life Assurance Company to The Sea, Fire, Life Assurance Corporation, according to the directions of the said Act, or that you show cause," &c.

Return. "I," &c., "certify and return," &c.: "That, in and by the said Act," &c. (7 & 8 Vict. c. 110), "it is, amongst other things, enacted: (a) That the said Act shall apply to every Joint Stock Company as thereafter defined, established in any part of the United Kingdom," &c., "except," &c., "for any commercial purpose, or for any purpose of profit, or for the purpose of assurance or insurance (except banking companies, schools, and scientific and literary institutions, and also friendly societies, loan societies, and benefit building societies, respectively duly certified and enrolled," &c., "other than such friendly societies as grant assurances on lives," &c.): "And it is also in and by the said Act further enacted: (b) That, before proceeding to make public, whether by way of prospectus," &c., "any intention or proposal to form any company for any purpose within the meaning of that Act, whether for executing any such work as therein aforesaid under the authority of parliament, or for any other purpose, it shall be the duty of the promoters of such Company, *and they or some [*806 of them are hereby required, to make to the office thereby provided for the registration of Joint Stock Companies (and thereafter called the Registry Office) returns of the thereafter following particulars according to the schedule (C) thereunto annexed; that is to say (amongst other things): 1. The proposed name of the intended Company;" "2. The business or purpose of the Company;" "3. The names of its promoters, together with their respective occupations, places of business (if any), and places of residence:" and also, "afterwards, from time to time, until the complete registration of such company, a return of a copy of every addition to or change made in any of the above particulars." (c) And it is also in and by the said Act

(a) Sect. 2.

(b) Sect. 4.

(c) Sect. 15 (not set out on the return) enacts: "That when the particulars and documents severally by this Act required to be returned to the said Registry Office shall have been so returned, it shall be the duty of the said Registrar of Joint Stock Companies and he is hereby required to cause to be written on every such document and return of particulars brought to him for registration the day of the receipt thereof," &c. (to number the document, and to acknowledge the receipt): "and that if such returns or documents be conformable to the provisions of this Act, or of any regulations in that behalf, then it shall be the duty of the Registrar, and he is hereby required forthwith to register the same, and, on demand, to grant to such Company a

further enacted: (a) That, on the complete registration of any company being certified by the Registrar," "such Company and the then shareholders therein, and all the succeeding shareholders, whilst shareholders, *807] shall be and are thereby incorporated as *from the date of such certificate by the name of the Company as set forth in the deed of settlement, and for the purpose of carrying on the trade or business for which the Company was formed, but only according to the provisions of the said Act, and of such deed as aforesaid, and for the purpose of suing and being sued, and of taking and enjoying the property and effects of the said Company; and that such Company shall continue so incorporated until it shall be dissolved, and all its affairs wound up; but so as not in anywise to restrict the liability of any of the shareholders of the Company under any judgment, decree, or order for the payment of money which shall be obtained against such Company, or any of the members thereof, in any action or suit prosecuted by or against such Company in any court of law or equity; but that every such shareholder shall, in respect of such moneys, subject as hereinafter mentioned, be and continue liable as he would have been if the said Company had not been incorporated; and that thereupon it shall be lawful for the said Company, and they are hereby empowered (amongst other things): To use the registered name of the Company, adding thereto 'Registered;' and to sue and be sued by their registered name in respect of any claim by or upon the Company upon or by any person, whether a member of the Company or not, so long as any such claim may remain unsatisfied.

"And I," &c., "further humbly certify," &c., "that nothing in the said Act of parliament, or in any Act of parliament relating to Joint Stock Companies, contained authorizes or empowers any Joint Stock Company, before the complete registration thereof pursuant to the said Act of parliament, to enjoy, use, or exercise any of *808] the powers or privileges of a corporation, or at any time to assume or use the name, style, or title of a corporation, or to be provisionally or otherwise registered as, or in the name, style, or title of, a corporation: And that, by reason thereof, the said Company in the said annexed writ mentioned were not nor are entitled or empowered by law to have the said return of change in the name of the said Company (that is to say), from The Sea, Fire, Life Assurance Company, to The Sea, Fire, Life Assurance Corporation, received or registered by me the said F. W., under the provisions of the said Act of parliament. Wherefore I, the said F. W., do hereby humbly submit, and ask the

certificate of provisional or complete registration, as the case may require, signed by him, and sealed with the seal of his office; which certificate must set forth whether the Company has been constituted provisionally or completely; and that, in the absence of evidence to the contrary, any such certificate, or a copy of any such return as aforesaid, shall be received in evidence, without proof of the signature thereto, or of the seal of office affixed thereto."

judgment of the Court thereon, that I ought not to be required to give any further or other answer to the said writ, but that the premises hereinbefore mentioned form and are a sufficient answer thereto.

Demurrer and Joinder.

Power, for the Crown.—The Company may, under the statute, demand to have their name changed between provisional and complete registration: and the Registrar is bound to register the altered name, under sect. 15. Sect. 4 requires the promoters to return, among other things, “the proposed name of the intended Company:” and afterwards, until complete registration, “every addition to or change made in any of the above particulars.” By sect. 23, when provisional registration is certified, the promoters may act provisionally, and may “assume the name of the intended Company,” but coupled with the words “registered provisionally.” There is no objection, therefore, to the assuming of the new title, deception being *prevented by the additional words. The title of Corporation is a proper one, and the most accurate which the Company can assume. The preamble of the Act shows that it is in contemplation to invest the companies after mentioned with “the qualities and incidents of corporations;” sect. 2 also recognises the incorporation of companies by the particular operation of this statute; and sect. 25 expressly provides that, on complete registration being certified, the company and the then shareholders shall be and are by this Act incorporated, and shall so continue, and may sue and be sued, &c. As MAULE, J., said in *Pilbrow v. Pilbrow’s Atmospheric Railway Company*, 5 Com. B. 440, 472 (E. C. L. R. vol. 57), “from the moment of obtaining such a certificate, the Company becomes to all intents and purposes incorporated.” In *Regina v. Registrar of Joint Stock Companies*, 10 Q. B. 839 (E. C. L. R. vol. 59), the reason given by this Court against the change of name after complete registration was that the Company had then acquired the character of a corporation. [PATTESON, J.—I do not see what this has to do with the change of name from “Company” to “Corporation.” If they had changed it to “Society,” there might have been no objection; but taking the name of “Corporation” is a fraud.] It is the name of the “intended” Company. [PATTESON, J.—Why are they to be called a corporation when they are not one? and what can the object of the change be but fraud? You must argue that the Registrar is bound to register them by whatever name they choose to assume.] In general he is. If there is fraud in fact, it may be specifically assigned as the objection. Otherwise, the “intended” name *ought to be registered. [COLERIDGE, J.—The present name of the intended company.] If the objection prevail, they never could be registered as a corporation. [COLERIDGE, J.—I do not see why they should be.] Supposing the name of Corporation to be merely imaginary, there is no reason why it should not be assumed (in the absence of actual fraud) as well as Pantechnicon, or

other fanciful title. [ERLE, J.—The term “Corporation” has a known legal import.]

M. D. Hill, contra.—It is admitted, and clear from the case last cited, that the change could not be made after complete registration. The Legislature has guarded against undue change both before and after. And, until complete registration, the Company cannot have the incidents of a corporation. One of these is, that the responsibility of individuals is to some extent merged in that of the general body: a supposition to be especially guarded against in the case of a body of shareholders not yet fully registered. The statute does not apply to these bodies at any period the term “Corporation.” Sect. 23 speaks only of the intended “Company.” Sect. 25 declares them incorporated after complete registration, but does so in guarded language and with qualifications. PARKE, B., in *Ridley v. Plymouth Grinding and Baking Company*, 2 Exch. 711, 716,† speaks of companies after complete registration under this act as “quasi corporations.” It is no hardship on these persons to be disabled under the statute from calling themselves a corporation. They may obtain an incorporation by special act of parliament, as is pointed out by sect. 25. Associations *811] which have the fullest *right to the title of Corporation are not named by it; as The Governor and Company of the Bank of England and The East India Company. A principal question here is, whether the Registrar has any discretion as to registering a change of names, or whether it is strictly a ministerial act. But it is clear that this is a matter on which the Registrar must in some degree exercise his judgment. The Court of Common Pleas took that view with reference to sect. 7, in *The Banwen Iron Company v. Barnett*, 8 Com. B. 406 (E. C. L. R. vol. 65), where MAULE, J., held that the matters appearing on the face of the deed must be looked into by the Registrar. Supposing that he is a ministerial agent merely, the prosecutors must show that they have a clear legal right to be registered by the name they may have chosen, even if it were indecorous or absurd. As the name “Corporation,” proposed here, could not be used without danger of deception upon the public, a ministerial officer could not be legally bound to sanction the registering of such a name.

Power, in reply.—It is not probable that the Registrar was intended to be a judicial officer. By sect. 19 of stat. 7 & 8 Vict. c. 110, he need not be a lawyer; the Committee of Privy Council may make rules for regulating the execution of his office; and in his absence the Assistant Registrar may perform all his duties. The *Banwen Iron Company v. Barnett* does not affect this case. It was a decision under sects. 7 & 8: the defendant was a shareholder, resisting an action for calls; the deed was completely registered; and it was assumed(a) that he had been

(a) 8 Com. B. 431 (E. C. L. R. vol. 65).

party to the Company's proceedings for obtaining an *incorporation: and the decision was only that the Registrar might look at [*812 the face of the deed to see if the conditions of the Act had been complied with. [PATTESON, J.—There a complete registration had been granted. Can it be said here that the "return or document" is "conformable to the provisions of" the act, according to sect. 15, when it presents a name which, at the time, cannot be a true one? ERLE, J.—Do you say that, if the Registrar was of opinion that the title held out a falsehood for the purpose of deception, he could not refuse to register? Suppose the title indicated an association for the purpose of committing a crime, as poisoning.] The officer ought to register, but give notice to the authorities empowered to prevent criminal offences. [ERLE, J.—Would such a society have a right to demand the interference of this Court? COLERIDGE, J.—Could they claim a mandamus to register?] They could, if the change of name were a lawful one. [COLERIDGE, J.—Suppose the new name were that of an already existing corporation.] If there were fraud, or injury to other parties, there would be a remedy by action or indictment. But there is a guard against fraud in the words, in sect. 23, "registered provisionally." If the intended title were in itself *contra bonos mores*, a different question might arise from that now before the Court. [ERLE, J.—It seems to follow from your argument that the name, whatever it were, must be registered.] The company, when completely registered, would be entitled to the name of a corporation: the proposed title, with the words "provisionally registered," means that they are a body to be hereafter incorporated, within the meaning of sect. 2. They give the name which they will subsequently be entitled to bear. *[PATTESON, J.—Either they [*813 state that which is deceptive, or they are already incorporated, and do not require the Registrar's certificate.] They are incorporated provisionally. The defendant is arguing, in effect, not that he is justified in refusing to perform the act required, but that the refusal cannot in point of law be a grievance. It is too late to contend so, when the Court has granted a mandamus.

PATTESON, J.—The Company have been provisionally registered by the name of The Sea, Fire, Life Assurance Company. They now wish to change the word "Company" into "Corporation:" and they must mean by that something substantially different. But they are not really a corporation. If they were, they would want no certificate to incorporate them. The question raised by this mandamus is, whether the Registrar can, under any circumstances, refuse to register a company by the name presented to him. The validity of the return depends upon sects. 4 and 15. By sect. 4, the promoters are to return at the Registry Office, among other things, the proposed name of the intended company; and, by sect. 15, if the return be conformable to the provisions of the act, the Registrar is to register the matters

returned, and grant a certificate. The question therefore is, whether this return of name is conformable to the provisions: and I think it is in direct contravention of them. The company cannot become incorporated before complete registration; and they cannot change their name afterwards, according to *Regina v. Registrar of Joint Stock Companies*, 10 Q. B. 839 (E. C. L. R. vol. 59). The effect of this will be *814] that such a *Company cannot take the word "Corporation" as part of their name: but there is no reason that they should. At any rate, the return is not conformable to the statute, because it cannot be true that, at the time of making it, the company is a corporation.

COLERIDGE, J.—The object of the statute is to invest these companies with the incidents of corporations, but to make them only quasi corporations. The Registrar returns that nothing in the statute authorizes a company to assume the name Corporation before it is completely registered: the return is true, up to that point: and it is a good answer, if using the name in question is assuming to be a corporation. I think it clearly is so, and that the words "registered provisionally" do not, as Mr. *Power* suggests, prevent its being such an assumption. The Registrar, therefore, is right in objecting that these parties cannot claim to be called that which the law forbids. As to the argument that this question cannot be discussed because a mandamus has issued: the point might perhaps have been raised with more advantage on the application for a rule: (a) but we are not prevented from considering it on the mandamus and return.

ERLE, J.—The Company, by the name they propose to take, impliedly assert to all who hear of it that they are a corporation. It is suggested that the words "registered provisionally" are equivalent to a notice *815] that they are not incorporated; but I think a great *portion of the community, hearing the word "Corporation," would not understand that the additional words gave it any other than the ordinary meaning. The Registrar, therefore, was right in his refusal. We have indeed granted a mandamus in this case; but the writ calls upon us to give force to an assertion which is untrue. If we give judgment for the prosecutors, we must grant a peremptory mandamus for that purpose: and I think we may refuse to take such a step, if at any time we find that the prosecutor is proceeding for that which he has no right to enforce.

Judgment for defendant.

(a) The rule was granted without discussion, at the same time with the rule in *Regina v. Whitmarsh*, 15 Q. B. 600 (May 7th, 1849) (E. C. L. R. vol. 69), in which latter case the Court said that it would be best to hear the argument on the return.

The QUEEN v. The Churchwardens and Overseers of ST. MARY, SOUTHAMPTON, and the Guardians of the Poor within the Town and County of the Town of SOUTHAMPTON. Feb. 16.

No appeal lies against an order of justices under stat. 8 & 9 Vict. c. 126, s. 58, determining the place of settlement of a lunatic pauper confined under the provisions of that Act.

ON appeal against an order of two justices in and for the town and county of the town of Southampton, dated June 22d, 1846, the Sessions quashed the order, subject to the opinion of this Court upon a special case.

It appeared by the case that the justices, by their said order, made under stat. 8 & 9 Vict. c. 126, s. 58 (and set out in the case), adjudged the last legal place of settlement of William Henry Stay, a lunatic pauper, to be in the parish of Tarrant Hinton, in the county of Dorset.

The questions for this Court were: Whether by law the appellants could appeal against the said adjudication: and, if they could, Whether the *adjudication was, under the circumstances stated, good and valid. There were several objections on which the second ques- [*816
tion arose: among others, that no copy of the examinations or other evidence on which the order appealed against was made had been sent to the parish officers of Tarrant Hinton. But this objection was given up on the argument; (a) nor was any insisted upon, except that the appeal did not lie.

Phinn (who was to have argued against the order of Sessions) mentioned *Regina v. Tyrwhitt*, 12 Q. B. 292 (E. C. L. R. vol. 64), and *Regina v. St. Pancras*, 12 Q. B. 298 (E. C. L. R. vol. 64).

C. Saunders and *Massey*, in support of the order of Sessions.—Stat. 8 & 9 Vict. c. 126, s. 57, enacts that the lunatic, when confined under this act, shall, for the purpose of the act, be deemed “to belong to and continue chargeable to” the parish from which he shall have been sent, “until such parish shall in due course of law, as in the case of any other pauper, have established that such lunatic is settled in some other parish,” &c. That, by clear implication, gives an appeal against the adjudication of settlement. The “due course of law” is the course usually pursued in the case of an order of removal. That is, that, if the adjudication be not acquiesced in, the settlement shall have been investigated and affirmed on appeal against the adjudication, or an appeal against the order of maintenance. Sect. 58, which empowers the justices to pronounce upon the settlement, is followed by sections 61, 62, which enable justices to make orders of *maintenance [*817 and reimbursement upon the parish from which the lunatic was removed, or, if his settlement shall have been discovered to be in a different parish, then on such last-mentioned parish. And sect. 62

(a) Reference was made to *Regina v. Justices of Middlesex*, 5 D. & L. 9; see *Regina v. Justices of Glamorganshire*, 13 Q. B. 561 (E. C. L. R. vol. 66).

provides that the parish "affected by such order, may appeal against the same in like manner as if the same were a warrant of removal;" and the appellants and respondents "shall have all the same powers, rights, and privileges, and be subject to the same obligations, in all respects, as in the case of an appeal against a warrant of removal." That clause is the last of a series; it was not necessary that provision should have been expressly made for appealing at an earlier stage of the procedure: it follows, from the terms in which the appeal is ultimately given, that parties aggrieved by orders may appeal either when an adjudication of settlement is made under sect. 58, or when an order for payment is made under sects. 57 and 62: as, in the case of an ordinary pauper, the appeal may be against either the order of removal or the removal itself; *Regina v. Justices, &c., of Yorkshire*, 2 Dowl. & L. 488, *Regina v. The Recorder of Leeds*, 8 Q. B. 623 (E. C. L. R. vol. 55). If the appeal could not in any case be lodged before the appellants were affected by some proceedings founded on the adjudication, great inconvenience might arise: witnesses might be dead and documents lost. The lunatic might recover before any act was done which could be the subject of an appeal; and then the parish charged with the settlement would be concluded for ever by an order unappealed against.

Phinn was not further heard.

*818] *COLERIDGE, J.—I think no appeal lies. The power of appeal cannot be inferred from a supposed inconvenience in its being withheld. It must be given by express words or by necessary implication. In this case we find neither. It is argued, from the words "in due course of law" in sect. 57, that the course of investigation may be pursued up to an appeal, because the settlement is not otherwise "established" in due course of law. But the next section, which gives the justices power to adjudicate on the settlement, enacts that, if there be satisfactory evidence, they "shall, by order under their hands and seals, adjudge such settlement accordingly:" and it adds nothing as to an appeal. Sects. 59, 60, 61, have no bearing on the question. Sect. 62 proceeds upon the supposition that the pauper is adjudged to be settled in a parish other than that from which he was sent to the asylum; in which case he is not to be removed to the parish of settlement, but deemed to belong to it as if residing there; and the justices are authorized to make an order upon that parish for the payment of past and future expenses: and here it is provided that the officer of the parish "affected by such order, may appeal against the same in like manner as if the same were a warrant of removal." It would be strange if an appeal were expressly given in this case, as against an order of removal, and an appeal not given in terms, but yet contemplated, in the case of an adjudication of settlement. And, further, it has been decided that that adjudication may be contested on appeal against the order of main-

tenance.(a) The legislature has chalked *out the whole mode of procedure; and it appears conclusively that no appeal is [*819 given against the mere adjudication of settlement. The alleged inconvenience has been exaggerated: but, if there were an inconvenience, it stands upon plain principles that this, of itself, could be no warrant for an appeal; and it must be supposed that the parish where the settlement is adjudged to be will in the course of ulterior proceedings take measures to get rid of the burden if the pauper is not really settled with them. It is suggested by Mr. *Massey* that, if the lunatic becomes sane and is discharged, there will be no opportunity of appeal against the adjudication of settlement: but there must, even in that case, be an order for expenses of the inquiry, and of conveyance to the place of confinement; and on service of that order there will be an opportunity to appeal. There may have been good reasons why, in this statute, under which the adjudication of settlement has not the same consequences as under the ordinary poor law, the legislature may have been silent as to appeal on the mere question of settlement, and may not have thought proper to assimilate the proceedings in all respects to those under the general poor law.

ERLE, J.—An appeal does not lie unless by the express words of a statute or by necessary implication from the words. In this instance I find neither. There is no analogy between this case and that of a common order of removal. Under an order adjudicating the settlement of a lunatic I cannot imagine any grievance to arise unless an order for maintenance and expenses be founded upon it. The orders, together, then become equivalent in force to an order *of removal. Under a common order of removal the pauper may be removed [*820 as soon as the order is made: by the adjudication of settlement no person is warranted in taking the lunatic under his control; that authority is given by the order to remove and to receive.(b) The order for expenses of removal and maintenance is binding, by sect. 62, till reversed on appeal; but there is no clause which enacts so as to the adjudication of settlement.(c) Order of Sessions quashed.

(a) See *Ex parte Monkleigh*, 5 Dowl. & L. 404; *Regina v. Tyrwhitt*, 12 Q. B. 292 (E. C. L. R. vol. 64); *Regina v. St. Pancras*, 12 Q. B. 298 (E. C. L. R. vol. 64).

(b) Sect. 48.

(c) No other Judge was present.

MARKWELL v. DYSON. Feb. 26.

The Clerk of the Papers of the Queen's Prison, appointed, under stat. 5 & 6 Vict. c. 22, by the Secretary of State at a fixed salary, holds in effect the same office as the Clerk of the Papers of the Queen's Bench Prison, appointed, under stat. 27 G. 2, c. 17, by the Marshal of the Marshalsea: and that office was one belonging to the Court of Queen's Bench, and consequently within the provisions of stats. 11 G. 4 & 1 W. 4, c. 58, and 1 & 2 W. 4, c. 35.

Held, therefore, that the Clerk of the Papers of the Queen's Prison is entitled to insist on payment to him of the fees sanctioned by the Commissioners under stat. 1 & 2 W. 4, c. 36, in order that he may account for them to the Treasury.

KEENE, on behalf of the plaintiff, obtained a rule in this term, calling on Mr. Evison, the Clerk of the Papers in the Queen's Prison, to show cause why he should not be attached for a contempt in refusing to receive a writ of habeas corpus ad satisfaciendum unless he were paid 2*l.* 17*s.* 4*d.* for fees. In the same term, (a) Sir J. Jervis, Attorney-General, M. D. Hill and Welsby showed cause, (a) and Keene supported the rule.

*821] Counsel for the defendant said that the remedy of *the plaintiff, supposing the fees not to be demandable, was not by attachment; but they waived all formal objections, and prayed the Court to decide whether the fees were to be taken or not. *Cur. adv. vult.*

The facts disclosed by the affidavits, the statutes referred to, and the arguments used, sufficiently appear in the judgment of the Court, which was now delivered by

PATTESON, J.—After stating the nature of the application, his Lordship said:

The writ was issued at the instance of the plaintiff for the purpose of charging the defendant in execution. The question was, whether the Clerk of the Papers of the Queen's Prison had a right to require payment of any fee at all by the plaintiff for receiving the writ.

Before the passing of stat. 5 & 6 Vict. c. 22, (b) the office of Clerk of the Papers of the Queen's Bench prison was, by stat. 27 G. 2, c. 17, s. 7, in the gift of the Marshal of the Marshalsea of the Court of Queen's Bench; and the appointment was by that statute to be for as long as the person appointed should behave himself well in the office. Such an appointment would give an office for life, subject to the power of the Court of Queen's Bench under the 8th section of the act to remove for neglect or misbehaviour.

In 1829, William Hewitt was appointed Clerk of the Papers by the then Marshal of the Queen's Bench, and held the office at the time of *822] the passing of stat. 11 G. 4 & 1 W. 4, c. 58, and stat. 1 & 2 W. 4, c. 35. By the first of these statutes, persons holding offices in or belonging to any of the Superior Courts at Westminster

(a) January 24th, 1850, before PATTESON, COLERIDGE, and WIGHTMAN, Js.

(b) "For consolidating the Queen's Bench, Fleet, and Marshalsea Prisons, and for regulating the Queen's Prison."

were to furnish an account of the fees and emoluments of their offices (*a*) to the Commissioners appointed under that Act; and, by sect. 4, the Commissioners were to inquire into the legality as well as the amount of the fees, and might require proof to be made upon oath. By sects. 7 and 8 all fees that were legally received should continue to be received until otherwise directed, and be accounted for to the Treasury. By the last of the above statutes (1 & 2 W. 4, c. 85), all fees which the Commissioners deemed reasonable, and which had been received for fifty years before the 24th May, 1831, should be taken to be legal fees.

Upon the inquiry before the Commissioners under these acts of parliament, a list of the fees which were proved by oath to have been received by the Clerk of the Papers of the Queen's Bench Prison for fifty years before the 24th of May, 1831, was submitted to the Commissioners; and such fees were by them deemed to be reasonable; they were therefore to continue to be received until other directions should be given by competent authority, and were accordingly received by the Clerk of the Papers of the Queen's Bench Prison down to the passing of stat. 5 & 6 Vict. c. 22, and were accounted for to the Treasury.

Mr. Hewitt continued to hold the office of Clerk of the Papers of the Queen's Bench Prison until the passing of stat. 5 & 6 Vict. c. 22, when he retired. By that statute, the prisons of the Fleet and Marshalsea *were abolished, and the prison of the Queen's Bench was [*823 constituted (under the name of the Queen's Prison) the only prison for those who might have been imprisoned in the Queen's Bench, the Fleet, or the Marshalsea; and all the offices in the prisons of the Fleet and Marshalsea were abolished; and the future appointment of the officers of the Queen's Prison, as well as the regulation of the prison itself, was given to the Secretary of State of the Home Department. Some offices of the Queen's Bench prison were to be abolished upon the next vacancy; but the greatest number of offices remained as before, and amongst them the Clerk of the Papers, who was, however, upon the next vacancy to be paid by a salary; and, upon the retirement of Mr. Hewitt, Mr. Evison was appointed Clerk of the Papers with a fixed salary of 400*l.* per annum.

The fees, however, which before the passing of stat. 5 & 6 Vict. c. 22, had been received by the Clerk of the Papers and accounted for to the Treasury, continued to be received and accounted for after the Act had taken effect, in the same manner that they had been before. And the question before us was, whether, after that Act took effect, and the present Clerk of the Papers had been appointed with a fixed salary, he could lawfully insist upon being paid the usual fees for the performance of his duty, not indeed for his own benefit, but to be accounted for to the Treasury: and we are of opinion that he could.

Though the appointment of the Clerk of the Papers of the Queen's

(*a*) Which should have become due in the last ten years. Sect. 1.

Bench Prison was not by the Court or the Chief Justice, we entertain no doubt but that his office was one belonging to the Court, and, as such, within stat. 11 G. 4 & 1 W. 4, c. 58, and stat. 1 & 2 W. 4, *824] *c. 35; and that the fees which were enumerated in the lists approved by the Commissioners might be legally claimed and received by him, until otherwise directed. It is true that the present Clerk of the Papers, Mr. Evison, is in a different position from his predecessor, Mr. Hewitt, being paid by a salary, and not by fees; and his appointment was by the Secretary of State, under stat. 5 & 6 Vict. c. 22, instead of the Marshal; but those circumstances do not appear to us to determine the question. The office of Clerk of the Papers of the Queen's Bench Prison is in effect the same as that of Clerk of the Papers of the Queen's Bench Prison, with some additional duties. The salary which he receives is not said by the Act to be in lieu of fees: and, until otherwise directed by competent authority, we think he was justified in insisting upon payment of the same fees that had been theretofore paid to the Clerk of the Papers of the Queen's Bench Prison whilst it belonged to that Court only, and which had been found to be legal and reasonable by the Commissioners, and were accounted for by him to the Lords of the Treasury. Until some change is made by the Legislature, or others competent, with respect to the payment of those fees, the Clerk of the Papers appears to us justified in insisting upon payment of them; and the rule therefore in this case will be discharged, without costs.

Rule discharged.(a)

(a) Reported by C. Blackburn, Esq.

*825] *ROBERT BUNTER and THOMAS FISHER v. HENRY CRESSWELL, Clerk. Feb. 26.

A sequestration issued on a judgment of this Court, against a beneficed clergyman: it was published, and the sequestrator entered into receipt of the profits of the benefice. Subsequently the defendant (by proceedings under stat. 3 & 4 Vict. c. 86) was suspended from all exercise of his office, and from receiving the fruits of his benefice, for eighteen months. The Bishop issued a sequestration on this sentence, to a different sequestrator, which was published: the judgment debt for which the first sequestration had issued being still unsatisfied. On a rule calling upon the bishop to show cause why he should not pay the plaintiff, at whose suit the first sequestration issued, the profits of the benefice received, Held, that the suspension, for the time of its endurance, operated in respect of perception of the profits, as amotion would have done, not only against the clerk, but against his creditors; and the rule was discharged as to the profits received after the second sequestration was published.

THE plaintiffs, in Trinity term 1848, obtained a rule calling on the Bishop of Bath and Wells to show cause why he should not pay to the plaintiffs the sum of 511*l.* 8*s.* 1*d.* levied under the writ of sequestrari facias issued in this cause. Upon the hearing of the rule it was ordered

that the Bishop should pay to the plaintiffs 145*l.* 15*s.* 6*d.*, being the amount of the profits received before 13th September, 1846, and that, as to the profits received after that date, amounting to 365*l.* 7*s.* 7*d.*, the facts should be stated for the opinion of the Court in a special case, which was done accordingly. The special case was argued in last Hilary term(a) by *Montagu Smith* for the plaintiffs and *Rogers* for the Bishop.

Cur. adv. vult.

The facts stated in the case, and the arguments of counsel, sufficiently appear in the judgment of the Court, which was now delivered by

PATTESON, J.—In this case a sequestrari facias *issued out of this Court in April, 1843, on a judgment recovered against the [826 defendant in the March preceding; it was addressed to the Bishop of Bath and Wells, who, in November, 1843, issued his sequestration, and sequestered the defendant's vicarage of Creech St. Michael. Publication immediately took place; and the sequestrator entered into the receipt of the profits of the benefice.

In 1844 a proceeding was promoted in the Arches Court against the same defendant, under the Church Discipline Act (3 & 4 Vict. c. 86): and, on the 12th February, 1846, a decree was pronounced, by which he was suspended, for eighteen months then next following, "from all discharge and function of his clerical office, and the execution thereof, that is to say, from preaching the word of God, administering the sacraments, and celebrating all other duties and offices in the said church and parish, and elsewhere within the province of Canterbury, and from taking and receiving the fruits, tithes, rents, profits, salaries, and other ecclesiastical rights, dues, and emoluments whatsoever, belonging or appertaining to the said vicarage and church."

This judgment was duly published on the 8th March, 1846: and, on the 10th September, 1846, the Bishop of Bath and Wells issued his sequestration, to a different sequestrator, which was duly published on the 13th September, 1846.

The question for our consideration is, substantially, what effect, if any, this sequestration has upon that previously in operation; and that question must depend, for its answer, upon the nature and effect of the judgment of suspension. It was not contended that *the pre- [827 vious sequestration, issued under the authority indirectly of this Court, took away from the Court Christian the jurisdiction to suspend, or from the Bishop the power and duty to issue the second sequestration in execution of that sentence; but that, to the extent of the "ecclesiastical goods," to which it applied, it so took them out of the incumbent as to prevent the second sequestration from operating upon them. And, as the first writ is in effect in terms as large as the second, if this argument can be sustained, it must render the second wholly inoperative, until the judgment in respect of which it issued be satisfied.

The vicar, it was said, was put out of possession by the first writ;

and therefore there was nothing for the second to attach upon. For this point the cases of *Doe dem. Morgan v. Bluck*, 3 Camp. 447, and *Harding v. Hall*, 10 M. & W. 42,† were relied upon; but neither case seems to us to establish the proposition in the sense in which it was put forward in the argument. In the former, the defendant had received proper notice to quit the glebe land of which he was tenant to the rector at Christmas, 1812; the demise by the rector was laid on the 1st of January, 1813; and the sequestration relied on for the defendant as ousting his title to sue was not issued till the 3d; it could not therefore be disputed that the rector had a good title on the day of the demise, which was all that was decided. Mr. Justice DAMPIER indeed went on to say, and correctly we think, that the rector was not entitled to the possession of the lands, and that he could not sue out a writ of habere facias possessionem; but the right to be restored to the actual possession, whereby he would defeat the operation of *the previous
*828] writ of execution, may well be out of him, and yet he may for certain purposes have a possession in law, and the living be full of him, so as to make it subject to the sentence of the Ecclesiastical Court. In the second case the point did not directly arise. The question was as to the right of action, and for that purpose as to the possession in the *sequestrator* under the writ of execution; PARKE, B., speaking with reference to this, uses the expression that the publication of the sequestration takes the possession out of the rector and places it in the Bishop.(a) Lord ABINGER and Baron ALDERSON speak undecidedly on this point; and ROLFE, B., says nothing. But we apprehend it is clear that the defendant remained vicar after the first writ published; the vicarage was full of him; he might have been deprived of it, he might have resigned it, both which suppose a previously existing possession in some sense; nor could it be disputed that in either of these events the title, and the possession of the sequestrator, or rather the Bishop, under the first writ, would have determined.

So that the question is really brought to that of the effect of suspension. Amotion would have determined the effect of the first writ, as death would have done, permanently; will suspension have for the time the same or a less effect? Bishop Gibson (*Codex*, vol. ii. p. 1047, ed. 2) says that suspension *ab officio et beneficio* jointly, or *ab officio*, or *beneficio*, singly, may be called a *temporary degradation or deprivation, or both*: and the authority which he cites, and others to which we have referred, bear out this description of it. It is degradation, and deprivation, but both in a qualified sense, because only temporary; and therefore (because,
*829] *when the time has expired, and the conditions which the sentence may collaterally impose are fulfilled, the Court contemplates that the Priest will resume the exercise of his functions and re-enter into the enjoyment of his benefice) he is neither solemnly degraded

(a) 10 M. & W. 53.

(the insignia of his order are not stripped from him), nor is he absolutely amoved from his benefice. The distinction is well stated in the following passage, to be found in the *Institutiones Canonicae* of J. Devotus, tom. 4, p. 257, tit. xx. s. 6 (Rome, 1826). “*Accedit, quod clerici sacris officiis, aut ecclesiasticis stipendiis suspensi dignitatem, et beneficium non amittunt, sed tantum privantur fructibus beneficii, aliisque inde pendentibus, suique ordinis, ac dignitatis munera exercere prohibentur. Verum depositio non solum clericum ab omni munere ordinis, ac beneficii repellit, sed eum etiam officio, et beneficio omnino privat, titulumque aufert, ita ut ad illud sine nova collatione redire nequeat.*” In the sense in which we are now considering it, suspension can only take place with regard to ecclesiastical persons; but the term is a generic one in the Canon Law, and laymen may incur it; and this we mention because the effect of it in the latter case furnishes an analogy which illustrates the case in hand. By stat. 5 & 6 E. 6, c. 4, s. 1, against quarrelling and fighting in churchyards, the Ordinary for the offence specified may *suspend* the offender, if he be a layman, ab ingressu ecclesiae, if a clerk, from the ministration of his office, for so long a time as he shall by his discretion think meet and convenient, according to the fault. This suspension of a layman ab ingressu ecclesiae Bishop Gibson(a) says may be called a *temporary excommunication; and it seems to have borne the same relation to absolute [830 excommunication, which suspension for a time does to degradation and deprivation. Each was imposed for lighter offences; when they were exhausted, the party resumed the enjoyments from which he had been debarred, without formal restoration or new collation; the suspended layman continued a member of the church, and the suspended clerk continues a priest and incumbent; though both are debarred from the enjoyment of the respective rights, which such continuance would in itself imply.

If, however, any one, who in any sense claims under the suspended clerk, can claim to receive the fruits and profits of the benefice, two inconveniences will follow: First, They are withdrawn from the object for which they were primarily bestowed,—the due maintenance of him who performs the duties and bears the burthens of the cure. The church being for the time in substance deprived of its minister, it is cast upon the bishop to provide for the temporary vacancy; and, to enable him to do so, he is to receive the profits, not, as when he receives them in the execution of a writ from a temporal court, as a sort of sheriff, with a liability to account to the Court for his receipts, but in virtue of his office of chief pastor, responsible to no one so long as the church is properly supplied. But this he cannot do, if the funds for the maintenance of the minister may be kept from him by any prior execution or incumbrance. Secondly, The very end of the sentence

(a) Codex, vol. II., p. 1047 (ed. 2).

will be frustrated. In considering the principle which must govern this, the statutes which prevent the charging of benefices by incumbents, which do not indeed operate against executions or judgments, *831] *may be laid out of view: if the encumbrancer, whether in the capacity of creditor or any other, may maintain his claim against the bishop, the suspended incumbent in effect is the receiver of the profits; either *his* debt is paid thereby, or his grantee is receiving the fruits of *his* grant, but both in virtue of his right; so that his right must be held to exist at the very time when by the sentence it has been taken away.

We cannot therefore agree in placing the parties, the plaintiffs on the one hand, and the bishop on the other, as the counsel for the plaintiffs felt compelled to do, in the relation of contending encumbrancers, whose rights inter se were to be determined by priority of date: it appears to us that, if the plaintiffs can maintain their right now, they could equally do so if they were posterior in the date of their charge; because the only foundation on which they can stand is on the existence of such an interest in the incumbent after suspension as would be available to answer the writ of execution; and, whether it came earlier or later, the writ would attach on this, if it were in existence.

No direct authority was furnished us in the argument, nor have we been able to find any; we have been compelled therefore to decide this case upon principle; and it seems to us that, on principle, it is clear that the suspension, for the time of its endurance, operates, in respect of the perception of the profits, as amotion or death; that the plaintiffs' right therefore is suspended from the 13th September, 1846, the date of publication of the second sequestration. Nor is there any hardship in this: every creditor of a beneficed clergyman knows that his recourse to the ecclesiastical goods of his debtor is of a limited *832] nature, determinable by his *death, resignation, or amotion; and, such as it is, it is in addition to the same absolute recourse to his lay goods and lands as the creditor has against a layman.

A second point (a) was made in the argument, that the Bishop was estopped by his return from contesting this matter: and we decided that, under the circumstances, he was not.

The rule therefore will be discharged as to the sum of 365*l.* 7*s.* 7*d.*, the amount received since the 13th September, 1846, but without costs

Rule discharged accordingly. (b)

(a) As this point was of no general consequence, the facts relating to it are not stated.

(b) Reported by C. Blackburn, Esq.

ARDEN v. SULLIVAN. Feb. 26.

An agreement of demise for three years, executed in March 1845, in writing but not by deed, was prevented from operating as a lease by stat. 7 & 8 Vict. c. 76, and was not re-established as a lease by stat. 8 & 9 Vict. c. 106, which repealed the former act, but took effect only as from October 1845.

A tenant entered into possession of a house under such agreement, made with A. and B., paid them rent, and so became tenant from year to year to them, on such terms of the agreement as were not inconsistent with a yearly tenancy. Afterwards A. assigned all his interest in the premises to B. The tenant continued in occupation, and paid rent to B. singly. Held that, under these circumstances, it was to be presumed, in the absence of proof to the contrary, that the tenant had, in consideration of B. permitting him to continue, agreed to hold of B. on the terms on which he had held of A. and B.: and that an action lay at the suit of B. singly against the tenant for not putting the premises in repair and keeping them repaired: there being a stipulation to that effect in the agreement with A. and B., and that being a term not inconsistent with a yearly holding.

ASSUMPSIT. The declaration stated that, in consideration that defendant, at his, defendant's, request, had become and was tenant to plaintiff of a house, upon and subject to the terms that defendant should during the continuance of his said tenancy put and keep the said house in good repair and condition, and so leave the *same [*833 on the termination of his said tenancy or giving up possession of the same, defendant promised plaintiff, during the continuance of the said tenancy, to put and keep the said house in good repair and condition, and to leave the same, on the termination of the said tenancy or giving up possession of the said house, in such good repair and condition. Averments of continuance of the tenancy for a sufficient time to put the house in good repair, and termination thereof. Breach: that defendant did not put nor leave the house in repair. Pleas: Non assumpsit, and a traverse of the breach. Issues thereon.

On the trial, before ERLE, J., at the Middlesex sittings during Hilary term, 1849, it appeared that, in 1845, the plaintiff and Edward Twynam were owners of the premises, and that an agreement in writing between them and the defendant was executed on 28th March, 1845, of which the material part was as follows:

"The landlords agree to let, and the said James Sullivan agrees to take of them, from the 24th day of June next, for the term of three years, and, if he should afterwards continue with leave of the landlords, then as a yearly tenant subject to six months' legal notice from either party to the other, a house and premises situate No. 7 Warwick Court, High Holborn, in the county of Middlesex, upon the terms, conditions, and agreements, as follows, namely: That he, the said James Sullivan, shall pay the clear yearly rent of 67*l.*, half-quarterly, the first of such half-quarterly payments to be made on the 8th day of August, 1845, and shall also pay all land tax, sewers rates, water rent or rates, and all other rates, taxes, outgoings, and assessments whatsoever in respect of the premises or any part *thereof. And the tenant shall also put and keep the house and premises in good repair and con- [*834

dition, and so leave the same on the termination of the tenancy or giving up possession, with all erections, fixtures, improvements, and other things whatsoever that now are or shall hereafter be in any manner erected, fixed, or fastened therein, save only the gas pipes and fittings (damage by fire excepted)." There were several other stipulations as to the manner in which the house should be occupied; but none qualifying those above set forth, or requiring for their observance a tenancy for a longer period than one year.

The defendant entered under this agreement, and paid rent to Arden and Twynam. On 16th June, 1847, Twynam conveyed all his interest in the premises to the plaintiff. The defendant was informed of this conveyance, and subsequently paid rent to the plaintiff alone. The defendant quitted possession at Midsummer, 1848. There was evidence that he left the premises out of repair. Counsel for the defendant objected that the action ought to have been brought in the names of Arden and Twynam, with whom the agreement was made. The learned Judge reserved leave to move to enter a nonsuit on this ground. The other questions were left to the jury, who found for the plaintiff.

Dowling, Serjt., in the ensuing term, obtained a rule nisi to enter a nonsuit.—He cited *Richardson v. Gifford*, 1 A. & E. 52 (E. C. L. R. vol. 28), and *Beale v. Saunders*, 3 New Ca. 850. He also obtained a rule on the ground of misdirection: but, on the discussion, it appeared *835] that the ruling of the learned *Judge had been misunderstood. The argument on this point is omitted. In last term, (a)

Knowles and W. Pitt Taylor showed cause.—The agreement in writing, being after the 1st January, 1845, was subject to stat. 7 & 8 Vict. c. 76, s. 4, and could not operate as a lease. That statute is repealed by stat. 8 & 9 Vict. c. 106, as from the 1st October, 1845; but the agreement was before that day, and consequently not affected by the latter statute. The effect, therefore, of the defendant's entry and payment of rent was, that he became tenant to Arden and Twynam, not for the term of three years, but from year to year, on the terms in the agreement, so far as they are applicable to such a tenancy; *Doe dem. Rigge v. Bell*, 5 T. R. 471, *Richardson v. Gifford*, *Berrey v. Lindley*, 3 M. & G. 498 (E. C. L. R. vol. 42). Then, when Twynam assigned his part of the reversion to the plaintiff, the plaintiff became the sole landlord, and the defendant was his tenant from year to year. That alone would not give him a right to sue singly; for, though covenants run with a reversion, promises not under seal do not; *Brydges v. Lewis*, 3 Q. B. 603, 605 (E. C. L. R. vol. 43). But the plaintiff might have given the defendant notice to quit; which was not the case in *Brydges v. Lewis*. There, the plaintiff, the assignee, having no power to turn out the lessee, consideration for a new promise on his part was wanting. But where the party becoming landlord has such power, and the tenant, knowing

(a) January 22d. Before PATTERSON, COLERIDGE, and ERLE, Js.

this, pays him rent, it operates as a fresh contract, by which the tenant promises to hold under the landlord (in this *case the plaintiff [*836 singly) on the terms contained in the previous agreement; Buckworth v. Simpson, 1 Cro. M. & R. 834,† S. C. 5 Tyr. 844. The fallacy on the other side is in treating this as an action brought on the agreement in writing: that, no doubt, is with the plaintiff and another; but the action is brought on a fresh contract with the plaintiff alone, to be his tenant on the terms contained in that writing. [ERLE, J.—That may be where the terms are such as are applicable to the tenancy from year to year. But is a promise to put and leave in repair one which would be made on so short a tenancy as from year to year? In Richardson v. Gifford the contract was to keep in tenantable repair.] The answer to that objection seems given by LITLEDALE, J., in the same case. “If a party chooses to rely on being merely let into possession, to waive a lease, and at the same time to engage that he will keep the premises in tenantable repair during the whole time they shall be in his occupation, he is bound by that agreement.” That applies, whatever the terms be; and, though perhaps the terms might be so inapplicable to a tenancy from year to year as to show that a party could not have intended to become tenant from year to year on them, the terms in the present agreement are not inapplicable. In Digby v. Atkinson, 4 Camp 275, a covenant to keep in repair, in a lease, was deemed to regulate the terms under which the tenant held on as tenant from year to year: and the premises having been burned, he was held liable to rebuild. [PATTESON, J.—The argument on this point in Buckworth v. Simpson turns upon the inference to be drawn from the absence of notice to quit: and that was what I had in my mind *in Brydges v. [*837 Lewis. But that inference is a matter for the jury; and I am afraid no question upon it was put to them in this case.] The defendant’s counsel should have caused this question, if important to them, to be put distinctly to the jury. That it was a question for them appears from the dicta in Johnson v. The Churchwardens of St. Peter, Hereford, 4 A. & E. 520 (E. C. L. R. vol. 31), (a) and from Mayor of Thetford v. Tyler, 8 Q. B. 95 (E. C. L. R. vol. 55). The jury here have assumed the new contract; and the facts show a good consideration for it.

Hawkins, contrâ.—The question of new contract seems to have been discussed on both sides, at the close of the case, as a question of law. (b) As to the effect of the late statutes: it is true that stat. 7 & 8 Vict. c. 76, s. 4, would have reduced the tenancy commenced in March, 1845, to a tenancy from year to year. But, when that act was repealed by stat. 8 & 9 Vict. c. 106, the agreement of March, 1845, thereupon became good as a written lease for three years. [PATTESON, J.—The

(a) See Jones v. Shears, 4 A. & E. 832 (E. C. L. R. vol. 31).

(b) *Hawkins*, who was not at the trial, referred to the notes on the brief of *Dowling*, Serjt.

repeal operates, by sect. 1, as from 1st October, 1845.] The effect is as if the prior act had never passed. Therefore, at the time of the assignment in 1847, which was subsequent to stat. 8 & 9 Vict. c. 106, the defendant was tenant to Arden and Twynam under a lease for three years, valid by the Statute of Frauds. This action is expressly for breach of an agreement contained in that lease; but the assignee of the *838] reversion cannot sue in his own name for breach of that contract, stat. 32 H. 8, c. 34, s. 1, not applying to parol agreements; *Standen v. Christmas*, 10 Q. B. 135 (E. C. L. R. vol. 59). Payment of rent to the assignee does not carry his right in this respect any farther; for the party actually entitled to the reversion is entitled to the rent independently of the statute, and without an agreement. And, as to the suggestion that, upon the assignment in 1847, the defendant became tenant to Arden alone, no evidence was given of that fact, nor was the opinion of the jury taken upon it. They would probably not have believed that the defendant would enter into a new engagement to repair, having only a year to remain on the premises. If the tenancy was ultimately from year to year, there was ground for contending that such a tenancy began before the assignment; then the contract to repair would be a contract with two joint landlords; and it could not be assumed that, when the defendant became tenant to one, he bound himself anew under the agreement to repair. In *Brydges v. Lewis* the fact of a new contract was not put in issue. [PATTESON, J.—The language of Lord ABINGER, and PARKE, B., in *Buckworth v. Simpson* is very strong.] At least it was a question for the jury whether or not the tenancy went on upon the former terms after the assignment.

Cur. adv. vult.

PATTESON, J., now delivered the judgment of the Court.

*839] The agreement, under which the defendant entered into possession, being made in March, 1845, was prevented from operating as a lease by stat. 7 & 8 Vict. c. 76, which came into operation in December, 1844, and was an agreement only; and we think that stat. 8 & 9 Vict. c. 106, repealing so much of the former statute as related to agreements from October, 1845, did not apply to the agreement in question; both because it was made at a time in respect of which the former statute remains unrepealed, and, also, because the nature of a contract is fixed by the intention of the parties at the time when it is made. The defendant, by entering under this agreement and paying rent for a year, must be presumed to have agreed to be tenant from year to year under Twynam and Arden, upon the terms contained in the agreement, none of those terms being so inconsistent with that estate as to rebut this presumption.

Thus far the law appears to have been settled; but, upon the assignment by Twynam to Arden of his part of the reversion, a new reversion was created; and the defendant, by continuing to hold possession and

to pay rent, continued the estate from year to year under the assignee of the reversion; and, as a contract not under seal does not pass with an assignment of the reversion, the question has arisen whether there is any ground for presuming that the defendant, continuing to hold the same estate, agreed with the new reversioner to hold upon the same terms as he had held under the original reversioner. If he did, the original agreement with Arden and Twynam may be taken as rescinded, and the new agreement with Arden to have been substituted. It appears to us that these facts would have proved *the contract as alleged in *Buckworth v. Simpson*, 1 C. M. & R. 834,† S. C. [*840 5 Tyr. 520, viz., in consideration that the plaintiff would allow the tenancy to continue, and would forbear to give notice to quit, the defendant promised to hold upon the terms of the agreement. And, as, in the judgment of Mr. Baron PARKE, such an agreement is said to be implied from such a state of the facts, the declaration in this case may be on that principle supported, being in the form applicable to implied agreements.

We do not mean to say that this implication might not be rebutted if there were any facts which ought to lead the jury to infer a different intention in the parties; but without any evidence to the contrary such an implication ought to be made. And the importance of this view for effecting the intention of the parties in respect of estates from year to year under agreements is clearly stated in the same judgment.

Rule discharged.(a)

(a) See *Doe dem. Davenish v. Moffat*, 15 Q. B. 257 (E. C. L. R. vol. 69).

This case in part is reported by C. Blackburn, Esq.

When a tenant holds over, he will be supposed to hold on the terms of the expired lease: *Fronty v. Wood*, 2 Hill, S. C. 367. The law implies a new contract similar to the former lease: *Brewer v. Knapp*, 1 Pick. 332; *Ellis v. Paige*, *Ibid.* 43; *Diller v. Roberts*, 13 Serg. & R. 60; *Bacon v. Brown*, 9 Conn. 334; *Phillips v. Morgan*, 4 Whart. 226; *De Young v. Buchanan*, 10 Gill & Johns. 149; *Harkins v. Pope*, 10 Alabama, 493.

*HOULDEN v. SMITH. Feb. 26.

[*841

A judge of a court of record is answerable in an action for an act done by his command when he has no jurisdiction, and is not misinformed as to the facts on which jurisdiction depends.

The plaintiff, who dwelt and carried on business at Cambridge, out of the jurisdiction of the Spilsby county court, was sued in that court by leave of the judge, under stat. 9 & 10 Vict. c. 95, s. 60, the cause of action having arisen within the jurisdiction of the court; and judgment was duly obtained against him. Afterwards, while the plaintiff still dwelt and carried on business at Cambridge, a judgment summons was issued by order of the judge of the Spilsby Court, under sect. 98, calling upon the plaintiff to be examined as to his estate and effects; and, the plaintiff not appearing, the judge, knowing the facts, but believing, nevertheless, that he had authority, made an order that the plaintiff should be committed for his contempt.

Held, that the commitment was without jurisdiction; and that, as the judge had ordered it under a mistake of the law and not of the facts, he was liable in trespass.

TRESPASS for false imprisonment. Pleas: 1. Not Guilty. Issue thereon. 2. That defendant acted under stat. 9 & 10 Vict. c. 95, and that a month's notice of action was not given. Replication: that there was notice. Issue thereon.

On the trial, before PARKE, B., at the Cambridge Summer Assizes, 1848, a verdict was found for the plaintiff, subject to the opinion of this Court upon a case, of which the substance was as follows.

The defendant was judge of the county court of Lincolnshire, holden at Spilsby. The plaintiff dwelt and carried on his business at Cambridge, out of the district assigned to the Spilsby Court. The defendant, on the 8th July, 1847, gave leave to two persons of the names of Young and Madden, to summon plaintiff to the Spilsby Court on a cause of action which had accrued in the district of that Court. Plaintiff was summoned at Cambridge; he did not appear; and, on proof of the summons, judgment was given against him by default. This judgment being unsatisfied, Young and Madden, the plaintiffs in the plaint, applied for, and obtained from the county court, a judgment summons, under stat. 9 & 10 Vict. c. 95, s. 98, calling on the plaintiff, *842] as defendant in the plaint, to appear in the county court, holden at Spilsby, in order to be examined by the judge of that court, and giving him notice that, in case of his not appearing, he might be committed to the common gaol at Spilsby. This summons was served on the plaintiff at Cambridge, where he resided, out of the district of the Spilsby court. The plaintiff having disregarded this summons, and not appearing at the Spilsby court, and the service of the last-mentioned summons having been duly proved, the defendant, whilst acting as and in the capacity of judge of the Spilsby county court, and *bonâ fide* believing he had power and authority as such judge to make such an order, made, in the minute book of the Spilsby court, a memorandum in the action in that court, ordering that the defendant in the plaint, the now plaintiff, should for his contempt be committed to Cambridge gaol. A warrant issued accordingly; and the plaintiff was taken under it and imprisoned in Cambridge gaol until discharged on habeas corpus. Notice of action given in due time was proved.(a)

The case was argued in last term.(b)

Watson, for the plaintiff.—The proceedings in the county court were regular until the judgment summons issued. By stat. 9 & 10 Vict. c. 95, s. 98, any party who has obtained an unsatisfied judgment in any court holden under that act, may obtain such a summons from “any county court within the limits of which any other party shall then dwell or carry on his business.” This does not authorize such an application to the *843] court in which such judgment was obtained, unless the defendant reside or carry on his business within its limits; therefore

(a) See also the statement of facts, p. 850, post.

(b) 18th and 25th of January, 1850, before PATTERSON, COLERIDGE, and WIGHTMAN, J.

the defendant, the judge of the Spilsby court, had no jurisdiction to issue the summons, and consequently no jurisdiction to commit for the alleged contempt. It probably will not be denied on the part of the defendant that the imprisonment was wrongful: and it is admitted by the plaintiff that, when a judge comes to a wrong conclusion either of law or of fact, he is not responsible for such a wrong decision, if it be in a matter over which he has jurisdiction. But, when a judge has no jurisdiction over the matter, he is responsible, though he acts because he erroneously thinks he has jurisdiction. This distinction, which runs through all the cases, is exemplified in *Carratt v. Morley*, 1 Q. B. 18 (E. C. L. R. vol. 41). The defendant in the present case is a judge of a court of record, with an authority limited by statute. His order for the imprisonment of the plaintiff, not being within the scope of his special jurisdiction, given him by the statute, is void; and the judge who made it is liable in trespass; *Watson v. Bodell*, 14 M. & W. 57;† *Miller v. Seare*, 2 W. Bl. 1141. There is a class of cases, of which *Thomas v. Hudson*, 14 M. & W. 353,†(a) is one, which decide that an officer, obeying the order of a court, is protected, though the order itself was void. The principle on which those decisions rest is shown in *Andrews v. Marris*, 1 Q. B. 3 (E. C. L. R. vol. 41). The officer is protected because he is bound to obey the commands of his superior, if formally given, without inquiring whether *the superior was justified or not; but that principle is not applicable to the judge [*844 himself. The whole law on the liability of a judge is to be found in *Calder v. Halket*, 3 Moore's Privy Council Cases, 28, and in *Taaffe v. Downes*, 3 Moore, P. C. C. 36, note (a). PARKE, B., in delivering the judgment of the Judicial Committee of Privy Council in *Calder v. Halket*, states the law to be that a judge has an immunity in respect of any act of a judicial nature within the general scope of his jurisdiction, "and whether there was any irregularity or error in it or not, would be punishable by ordinary process at law. But the protection would clearly not extend to a judicial act, done wholly without jurisdiction." He afterwards adds another qualification to the liability of a judge: "It is well settled that a judge of a court of record in England, with limited jurisdiction, or a justice of the peace, acting judicially, with a special and limited authority, is not liable to an action of trespass for acting without jurisdiction, unless he had the knowledge or means of knowledge of which he ought to have availed himself, of that which constitutes the defect of jurisdiction." And he cites *Gwinne v. Poole*, 2 Lutw. Appendix, 1560, 1566, *Pike v. Carter*, 3 Bing. 78 (E. C. L. R. vol. 11), and *Lowther v. The Earl of Radnor*, 8 East, 113. The defendant, in the present case, had in fact no jurisdiction; for the plaintiff dwelt and carried on his business out of the limits of the defendant's district. The facts show that the defendant had knowledge

(a) Judgment of Exch. affirmed on Error in Exch. Ch., *Thomas v. Hudson*, 16 M. & W. 885.†

of this; he had given leave to summon the plaintiff; which leave would not have been required if the plaintiff had resided or carried on his business *within the district. The service of the notice in Cam-
 *845] bridgeshire was proved before the defendant at the time when he issued his order to commit the plaintiff to Cambridge gaol; and it would have been wrong to commit him to any gaol except Spilsby if he had resided in that district.

Then, supposing that the defendant has a defence, it is not open to him under the plea of Not guilty. In *Mostyn v. Fabrigas*, 1 Cowp. 161, 172, which was trespass for false imprisonment, Lord MANSFIELD says, "Nothing is so clear as that to an action of this kind the defendant if he has any justification must plead it;" and, again, "Therefore by the law of England, if an action be brought against a judge of record for an act done by him in his judicial capacity, he may plead that he did it as judge of record, and that will be a complete justification. So in this case, if the injury complained of had been done by the defendant as a judge, though it arose in a foreign country where the technical distinction of a court of record does not exist, yet sitting as a judge in a court of justice, subject to a superior review, he would be within the reason of the rule which the law of England says shall be a justification; but then it must be pleaded." This is quoted at the bar in *Picton's Case*, 30 Howell's State Trials, 225, 751; and it has always been the practice to plead specially. In *Hamond v. Howell*, 2 Mod. 218, *Groenvelt v. Burwell*, 1 Ld. Raym. 454, and *Taafe v. Downes*, 3 Moore's Privy Council Cases, 28, note (a), the defence was specially pleaded. [WIGHTMAN, J., referred to *Holroyd v. Breare*, 2 B. & Ald.
 *846] 473.] There the actual trespasser, *in seizing the goods of the plaintiff, did an act not authorized by the defendant, who, as judge, had issued process commanding him to seize the goods of a third person. The defence was a denial that the defendant did the wrongful act, which is Not guilty. In the present case the bailiff imprisoned the plaintiff by express order of the defendant, but he says he was justified in giving such an order; that justification should be specially pleaded. [WIGHTMAN, J.—In *Dicas v. Baron Brougham & Vaux*, 1 M. & Rob. 309, S. C. 6 Car. & P. 249 (E. C. L. R. vol. 25), the defence was admitted under Not guilty.] There the defendant was protected by the common law as a judge, and also under stat. 6 G. 4, c. 16, and was entitled to plead the general issue by sect. 44; the last defence was open under the general issue, as the cause was before the rule of Trinity term, 1 Vict. 8 A. & E. 279 (E. C. L. R. vol. 35). That point appears, by the report in *Carrington & Payne*, to have been taken at the trial, though it is not noticed in the report in *Moody & Robinson*. [WIGHTMAN, J.—According to my recollection of the case, Lord LYN-
 HURST decided it entirely on the ground that the act of a court of record was not a *primâ facie* trespass by the judge, and consequently that

proof of its being the act of a court of record was admissible under Not guilty.]

Worlledge, contra.—The defence may be given in evidence under Not guilty. In *Dicas v. Baron Brougham & Vaux*, Lord LYNDHURST appears to have acted on the principle just stated from the Bench. Stat. 6 G. 4, c. 16, s. 44, is not mentioned in Moody & Robinson's report at all; and the reporters must have thought that Lord LYNDHURST ruled only on the point *which they noticed. In *Buron v. Denman*, 2 Exch. [*847 167, 189, 190,† the Court of Exchequer, on a trial at bar, directed the jury that, if the seizure of the goods by the defendant was a seizure by the Crown, it was an act of state, for which the defendant was irresponsible and, therefore, entitled to a verdict on Not guilty. That is the very principle of *Dicas v. Baron Brougham & Vaux*, as stated in Moody & Robinson. There are other authorities for it; *Tinsley v. Nussau*, M. & M. 52 (E. C. L. R. vol. 22), *Tunno v. Morris*, 2 C. M. & R. 298,† S. C. 5 Tyr. 949. [COLERIDGE, J.—These two last cases seem to be open to the same explanation as *Holroyd v. Breare*, 2 B. & Ald. 473.] In *Le Caux v. Eden*, 2 Dougl. 594, an action of trespass for false imprisonment incidental to the taking of a ship as prize which was afterwards acquitted by the Court of Admiralty, Not guilty was the only plea. In *Calder v. Halket*, 3 Moore, P. C. C. 28, 79, the Court seems to have inclined to the opinion that the same plea was sufficient at common law. The imprisonment here was by a warrant under the seal of the court. It is true, the defendant ordered that warrant to issue; but, if it is so far the act of the Court as to protect him, then he is not guilty of the trespass. It could hardly be contended that, if a prisoner under sentence of imprisonment brought an action against the judge of assize who sentenced him, the judge must plead specially.

Then is there a defence here? It must be admitted that the committal was wrong, under the circumstances; but the defendant would have had jurisdiction to summon *and commit the plaintiff if he had dwelt or carried on business within the limits of the Spilsby [*848 court. In delivering judgment in *Calder v. Halket*, 3 Moore, P. C. C. 76, PARKE, B., says: "We must consider the defendant as being in the same situation as a criminal judge in this country, with the qualification that he had no jurisdiction over one particular class, viz., the European born subjects of the British Crown; and the question is, whether he is liable to an action of trespass, for causing the plaintiff to be arrested, he being, in reality, exempt from his jurisdiction." He then, after discussing the various cases, concludes: "It is clear, therefore, that a judge is not liable in trespass for want of jurisdiction, unless he knew, or ought to have known, of the defect; and it lies on the plaintiff, in every such case, to prove that fact." Now how does the plaintiff in the present case prove that fact? The defendant committed him to

Cambridge gaol; and no doubt that shows that he was aware that the plaintiff resided in Cambridgeshire; but he might carry on business in Lincolnshire; there must be thousands of persons who carry on business in the metropolis, and therefore are within the jurisdiction of the judges of the Metropolitan county courts, and yet reside in Kent, Surrey, or Middlesex, so that the judge of the Metropolitan county court, if acting under the 99th section, must commit them to a gaol out of his district. There is nothing to show that the defendant here had his attention called to the fact that the plaintiff carried on his business out of the district of Spilsby. It is true that, some months before, he gave *849] leave to summon the plaintiff; but it is too much to *assume that a judge of a County court, who decides an enormous number of cases, remembers all that has occurred in his court. All that would in fact take place at the time of the committal would be that the judge would inquire if the person appeared, and if there was personal service. He could not be expected to surmise that the wrong court had been applied to, unless something called his attention to it. *Olliet v. Bessey*, 2 (T.) Jones, 214, *Gwinne v. Poole*, 2 Lutw. Appendix, 1566, *Pike v. Carter*, 3 Bing. 78 (E. C. L. R. vol. 11), *Lowther v. Lord Radnor*, 8 East, 118, 119, and an Anonymous (a) case in *Ventris*, are authorities that there must be something in the inferior court equivalent to a plea to the jurisdiction, or at least conveying clear notice to the judge that there was no jurisdiction, or else the judge is not liable. These authorities were not cited in *Carratt v. Morley*, 1 Q. B. 18 (E. C. L. R. vol. 41): and the ground of the decision against the commissioners in that case was, that it did not appear that the commissioners had any evidence before them that the plaintiff resided within their jurisdiction. In *Andrews v. Marris*, 1 Q. B. 3 (E. C. L. R. vol. 41), the action was not against the commissioners. In *Watson v. Bodell*, 14 M. & W. 57, 70, 71,† it was assumed that the want of jurisdiction was known to the defendant. In *Beurain v. Scott*, 3 Campb. 388, and *Smith v. Bouchier*, 2 Stra. 993, the objections to the jurisdiction were apparent on the face of the proceedings. *Miller v. Seare*, 2 W. Bl. 1141, is treated by HOLROYD, J., in *Basten v. Carew*, 3 B. & C. 649, 657 (E. C. L. R. vol. 10), as overruled by *Doswell v. Impey*, 1 B. & C. 163 (E. C. L. R. vol. 8).

*850] **Watson*, in reply, cited *Terry v. Huntington*, Hardres, 480, and *Wingate v. Waite*, 6 M. & W. 739,† and contended that the matter in question was wholly without the jurisdiction of the defendant, inasmuch as the authority given by the 98th and 99th sections was to proceed in *pœnam*, (b) an entirely new jurisdiction, and not in continuance of the original jurisdiction to hear and determine the case; and

(a) 1 *Ventris*, 236.

(b) See *Kinning's Case*, 10 Q. B. 730 (E. C. L. R. vol. 59); *Ex parte Kinning*, 4 Com. B. 507; and *Bowdler's Case*, 12 Q. B. 612 (E. C. L. R. vol. 64) (all on stat. 8 & 9 Vict. c. 127).

that the question of scienter was material in those cases only where, under given circumstances, jurisdiction existed.

Cur. adv. vult.

PATTESON, J., now delivered judgment.

This was an action for trespass and false imprisonment against the defendant, the judge of the county court in Lincolnshire. The defendant pleaded Not guilty, but not saying "by statute;" also a plea of want of notice of action; but the notice was proved at the trial. The facts appear to be that the plaintiff, being resident in Cambridgeshire, was sued in the county court at Spilsby in Lincolnshire by special order of the defendant under the 60th section of stat. 9 & 10 Vict. c. 95. The plaintiff was served with the summons in Cambridgeshire, and not appearing, judgment was given against him by default at the court at Spilsby on the 18th August, 1847. A judgment order was served on the plaintiff in Cambridgeshire on the 25th August. A warrant against the goods of the plaintiff within the jurisdiction of the Spilsby court was issued on the 14th of September, which was transmitted, *under the 104th section of the Act,(a) to the county court in Cambridgeshire, and returned "no effects." So far the proceedings were all regular. On the 21st September a summons was issued by order of the defendant, calling on the plaintiff to appear at the Spilsby court on the 7th October, and be examined as to his not paying the debt and costs, and as to his estate and effects. This summons was without jurisdiction; for the section, 98, which authorizes the issuing such summons, directs it to be issued by the county court within the limits of which the party shall *then* dwell or carry on his business; which in this case was the county court of Cambridgeshire; for in that county only the plaintiff dwelt and carried on his business during the whole of these proceedings. This summons was served on the plaintiff in Cambridgeshire on the 27th September. On the 7th October the plaintiff did not appear at the county court at Spilsby: and, the service of the last summons having been proved, the defendant, as judge of the court, *bonâ fide* believing that he had power and authority to do so, made a minute in the minute book of the court, whereby it was ordered that the plaintiff should, for contempt in not attending, be committed to Cambridge gaol for fourteen days. A warrant was made out accordingly; and he was so committed.

That this commitment was without jurisdiction is plain; that the defendant ordered it under a mistake of the law and not of the facts is equally plain; for it is impossible that he could be ignorant that the plaintiff dwelt and carried on his business in Cambridgeshire, the service of all the processes having been proved to have been made there, and the defendant having *originally specially allowed the plaintiff to be made in his court, within the jurisdiction of which the

(a) See stat. 15 & 16 Vict. c. 54, s. 5.

cause of action accrued, the defendant (the now plaintiff) residing in Cambridgeshire. This case is not therefore within the principle of *Lowther v. The Earl of Radnor*, 8 East, 113, 119, or *Gwinne v. Poole*, 2 Lutw. Appendix, 1560, 1566, where the facts of the case, although subsequently found to be false, were such as, if true, would give jurisdiction, and it was held that the question as to jurisdiction or not must depend on the state of facts as they appeared to the magistrate or judge assuming to have jurisdiction. Here the facts of the case, which were before the defendant and could not be unknown to him, showed that he had not jurisdiction; and his mistaking the law as applied to those facts cannot give him even a *prima facie* jurisdiction, or semblance of any. The only questions, therefore, are, whether the defendant is protected from liability at common law, being and acting as the judge of a court of record, in which case the plea of Not guilty would be sufficient; or whether he is protected by the provisions of any statute, and if so, whether he can take advantage of such statute, having omitted the words "by statute" in his plea and the margin of it.

As to the first question, although it is clear that the judge of a court of record is not answerable at common law in an action for an erroneous judgment, or for the act of any officer of the court wrongfully done, not in pursuance of, though under colour of, a judgment of the court, yet we have found no authority for saying that he is not answerable in an action for an act done by his command and authority when *853] he has no jurisdiction. Here the defendant had not only *no jurisdiction to commit the plaintiff to the gaol of Cambridgeshire, but he had no jurisdiction to summon him to show cause why he had not paid the debt. That summons ought to have been issued out of the county court of Cambridge.

The case of *Dicas v. Baron Brougham & Vaux*, 1 M. & Rob. 309, was cited: but it is plain that the order of commitment made by the defendant as Lord Chancellor was not without or in excess of jurisdiction; the question was whether it was regular or not, which clearly could not form the subject of an action. *Holroyd v. Breare*, 2 B. & Ald. 473, *Tunno v. Morris*, 2 C. M. & R. 298,† *S. C.* 5 Tyr. 949, and other similar cases, turned on the question whether the person doing the wrongful act was so servant of the defendant as to make him answerable for the act; and it was held that an officer is not such a servant to a judge of the Court: but none of those cases turned on the want of jurisdiction. We cannot therefore hold that the defendant in this case is protected from liability at common law.

Is he then protected by any statute? We find no statute which gives such protection. The statutes 21 Ja. 1, c. 12, s. 5, and 42 G. 3, c. 85, s. 6, enable the defence, when it exists, to be given in evidence under the general issue, but they do not protect a party acting without jurisdiction; and now even that privilege of pleading the

general issue only is coupled with this qualification, that the plea must be stated to be "by statute," which words are omitted here.

The judgment must therefore be for the plaintiff.

Judgment for plaintiff.(a)

(a) Reported by H. Davison, Esq., and C. Blackburn, Esq.

See *Dews v. Riley*, 11 Com. B. 434 (E. C. L. R. vol. 73), and stat. 15 & 16 Vict. c. 54, s. 6.

*The QUEEN v. The ABERDARE Canal Company. [*854
Feb. 26.

By statute incorporating a Canal Company, all persons seized of freehold or copyhold estates of 100*l.* per annum in the county of G., and all persons residing therein and having personal estates of the value of 2000*l.*, were appointed Commissioners for settling all questions and differences between the Company and the landowners, with power to take evidence on oath, and to assess compensation unless the parties should desire to have it assessed by a jury. The determinations of the Commissioners, the verdicts of the juries, and the Commissioners' judgments thereon, were to be deposited with the Clerk of the peace amongst the records of the Sessions. All the orders and proceedings of the Commissioners were to be entered in a book, and, being signed by them, to be deemed originals and received as evidence. Before acting, the Commissioners were to take an oath truly and impartially to execute their powers. No Commissioner was to act when interested. The Canal Company were to make bridges over the canal for the convenience of landowners, as the Commissioners should order; but, if landowners should find any of the bridges so ordered insufficient for the commodious use of the land, they were empowered, with the consent of the Canal Company, or, in case of their refusal for twenty-one days, then with the consent and approbation of the Commissioners, to make convenient bridges at their own costs.

By an entry of the Commissioners' proceedings, made as above, it appeared that a landowner had applied to the Commissioners at a meeting convened by public notice under the Act, for their sanction to the building of a bridge at his own cost; and that the Commissioners, after hearing evidence for the applicant, and counsel for the Company in opposition to the claim, gave their consent.

Held that the consent was a judicial act, and that the entry of it might be brought up by certiorari.

The application was on behalf of B., the owner of lands adjoining the canal: in fact, however, the bridge was not wanted for the use of his lands, but to bring coals from a colliery lying beyond them, which coals would be carried by the proposed bridge across the canal to a railway, and by that railway to the town of C., instead of going by the canal. The Chairman and several directors and shareholders of the Railway Company were sworn and acted as Commissioners when the application was heard and granted.

Held that, by reason of the interest they had in the result, the proceedings were void.

Quære, whether the accidental intrusion of one interested person, out of so large a body of Commissioners, would have vitiated the proceedings.

The statute enacted that *no meeting of the Commissioners should be held unless notice of the time, &c., of such meeting should be given in a county newspaper at least sixteen days before such meeting.*

By the above-mentioned entry, returned to a certiorari, it appeared that the meeting was held on February 12th, in pursuance "of a summons and notice in the M. G. newspaper" (a county paper) "of the 27th of January." The notice, as well as the newspaper, was dated of that day.

Held that the notice was insufficient, and that, on this ground also, the proceedings were bad and must be quashed. Although it appeared by affidavit that copies of the newspaper dated 27th were in fact published and circulated on the 26th.

PULLING, in Easter term last, obtained a rule nisi to quash (on return to a certiorari) a judgment and determination, consent and

*855] approbation, given by *the Commissioners under stat. 33 G. 3, c. 95,(a) on the application of the Marquis of Bute, and his trustees and guardians, for making a certain bridge over the Aberdare canal.

*856] **Crompton*, in the same term, obtained a rule to quash the certiorari quia improvidè emanavit.

The matter returned with the certiorari was a manuscript book, a plan, and a copy of the Merthyr Tidvil Guardian newspaper, bearing

(a) Stat. 33 G. 3, c. 95, is, "For making and maintaining a navigable canal from the Glamorganshire Canal, to or near the village of Aberdare, in the county of Glamorgan; and for making and maintaining a railway or stone road from thence to or near Abernant, in the parish of Cadoxton juxta Neath, in the said county."

The act incorporates the promoters by the name of The Company of Proprietors of the Aberdare Canal Navigation. Sect. 10 enacts: "That all persons seised of freehold or copyhold estates of 100*l.* per annum, within the county of Glamorgan, and all persons residing within the said county, and having personal estates of the value of 2000*l.*, shall be and are hereby appointed commissioners for the settling, determining, and adjusting all questions, matters, and differences which shall or may arise between the said Company of Proprietors, and the several proprietors of land," &c., that shall or may be affected by the execution of the powers granted. The section then proceeds to give the Commissioners power to take evidence upon oath, and to determine the amount of compensation to be paid to such parties as should acquiesce in the compensation being assessed by the Commissioners, and requires them, in case the parties do not so acquiesce, to summon a jury to assess such compensation.

Sect. 13 enacts: "That all the determinations of the said Commissioners which shall be submitted to and acquiesced in by the parties concerned, and also the verdicts of the juries, and the judgments of the said Commissioners thereon as aforesaid, shall be transmitted to and kept by the Clerk of the Peace amongst the records of the Quarter Sessions of the Peace for the said county."

Sect. 38. "That all the orders and proceedings of the said Commissioners shall be regularly entered in a book to be kept for that purpose, and that such entries (being signed by the said Commissioners) shall be deemed originals, and admitted as evidence in all Courts."

By sect. 54 the Company are to make such bridges, &c., and other works across the canal, &c., for the convenience of the occupiers of land through which the canal passes, as the Commissioners shall from time to time judge necessary and appoint.

Sect. 55 enacts: "That if the owners or occupiers of any lands or hereditaments through which the said canal shall be made, do or shall at any time or times find that any of the "bridges," &c., "which the said Commissioners shall have directed or appointed to be made by the said Company of Proprietors as aforesaid, are insufficient, either in the number or situation, for the commodious use and occupation of their respective lands," &c., "it shall be lawful for any such owners or occupiers, with the consent and approbation of the committee of the said Company of Proprietors, upon request made to them for that purpose, or in case of their refusal for the space of twenty-one days after such request, then with the consent and approbation of the said Commissioners, to make," "at their own costs," such bridges, &c., as shall be found and judged convenient.

Sect. 69 enacts that the Commissioners shall, before acting, take an oath truly and impartially to execute their powers.

Sect. 70 enacts "That no person shall be capable of acting as a Commissioner" "in any case where he shall be interested or concerned in the matter in question."

Sect. 71. That "no meeting whatsoever" of the Commissioners shall be had "unless previous notice of the time, place, and purpose of such meeting shall be given in some newspaper published or circulated within the said counties, or in such other manner as the said Company of Proprietors shall direct or appoint, at least sixteen days before such meeting."

Sect. 72 provides for the holding of general meetings of the Commissioners on request by five or more proprietors of the Navigation, or by the owner or occupier of lands, &c., to be affected by the canal or works; notice to be given "in manner aforesaid," within seven days after such request, of a general meeting to be held at a time specified, not less than sixteen nor more than twenty-one days from the day of request: provisions for adjournment in cases specified, and for reassembling on new notice.

date Saturday, 27th January, 1849, containing a notice by advertisement, dated the same day, of a general meeting of the Commissioners, to be held on February 12th. In the book was an entry, (a) commencing: "At a meeting of the Commissioners, constituted and appointed by the Act of Parliament," &c., "held at," &c., "on the 12th day of [857 *February, 1849, in pursuance of a summons and notice in the Merthyr Guardian newspaper of the 27th of January last," &c., "Mr. Lloyd, on behalf of the Marquis of Bute and his guardians and trustees, presented to the Commissioners, and left with them to file with their proceedings, a plan of a new bridge or passage proposed to be erected and made by them over the Aberdare Canal, and for the more commodious use and occupation of their farm and lands called Cwmbach in the parish of Aberdare, in the county of Glamorgan, being lands through which the said canal has been made; and by which plan was shown the place which had been judged most necessary and convenient for making such bridge, with the manner in which it was proposed to carry the same over the canal, and construct the same; and he called as witness Mr. T. Evans, solicitor, Cardiff, who proved Friday, the 26th January, 1849, as the date of publication of the newspaper containing the notice of meeting. Mr. T. Collingdon, agent to the trustees of the Marquis of Bute, proved the signature to the notice hereinafter mentioned, and that as trustees they were owners of Cwmbach Farm. Mr. Lloyd put in a notice, under one of the sections of the act of parliament, of a request to the committee of the Canal Company, which was kept by the Commissioners. Mr. J. S. Corbett, land agent to the Marquis of Bute, proved the receipt of rents of Cwmbach for the trustees, and that he accounted to them for the rents. Mr. H. W. Harris, clerk to Messrs. Perkins and James, proved the service of a duplicate notice of request and copy plan, put in," on the Committee of the Canal Company. "Mr. Collingdon proved the signatures of parties to the notice *requiring the Commissioners to call a general [858 meeting of the Commissioners, which the Commissioners kept with their proceedings. Mr. C. H. James, solicitor, Merthyr Tydvil, proved service of a duplicate notice to the Commissioners requiring them to call a meeting;" "and also proved that they had been sworn under the act before they had been served." "He also proved the signatures by the Commissioners to the notice, a copy of which appeared in the newspaper produced. He also proved that no answer had been returned by the Canal Company to the landowners' request." The entry then showed other examinations on behalf of the Marquis's trustees, and cross examinations by counsel who appeared for the Canal Company under protest, and who addressed the Commissioners; and

(a) An objection was taken to this entry as irregular, and not properly headed. COLWIGES J. said: Do you expect that we shall be very strict with a body to which the act makes any person having freehold or copyhold worth 100*l.* a year admissible? You must expect the proceedings to be informal. It is an anomalous Court.

that the question was put, whether the consent requested, to the erection of a bridge over the canal at Cwmbach, should be granted, which was carried on a show of hands, and the meeting then adjourned to the 19th of February. On that day there was an entry of the proceedings at the adjourned meeting, when the former minutes were signed.

The rules were drawn up on reading certain affidavits. The facts which the Court considered established and material sufficiently appear from the judgment. In this term (a) the two rules came on for argument. It was arranged that the two should be argued together.

Crompton, in support of the rule to quash the certiorari, and in opposition to the rule to quash the proceedings.—These minutes are not *859] of a nature to be the *subject of a certiorari: and that is a ground for making absolute the rule to quash the certiorari, and also a ground for discharging the rule to quash the minutes; *Regina v. Hatfield Peverel*, ante, p. 298, 317. A certiorari does not lie to remove any other than judicial acts; *Rex v. Lloyd*, Cald. 309, *In re Constables of Hipperholme*, 5 Dowl. & L. 79. When the act now in question is examined, it appears that the minutes are not of this nature. The power to make bridges and other works on a party's own land is one incident to the ownership and occupation of that land. The Legislature, in this act, gives power to make a canal through certain lands. They do not think fit to take from the owners of these lands the power they had at common law to make such works; but they attach a condition to its exercise. The Commissioners, by sect. 54, order the Company to make what they consider sufficient bridges and other works, for the convenient occupation of the lands intersected by the canal. The owners may, by sect. 55, make what additional bridges and other works they please; but it must be "with the consent and approbation of the committee of the said Company of Proprietors, upon request made to them for that purpose, or in case of their refusal for the space of twenty-one days after such request, then with the consent and approbation of the said Commissioners." If the Company take proceedings against the landowner for erecting a bridge, it will be necessary for his defence to show that there has been such consent given in fact, *860] by the Committee or by the Commissioners; but it will not be necessary to *prove either consent by any minute or written record. The Commissioners are directed to act judicially, in assessing compensation under sect. 10: when they so act, there are careful provisions for recording their proceedings at the Quarter Sessions. But the consent given to make a bridge or other work is not within sect. 10: it is not to be returned to the sessions, and may be entirely verbal. It is true that, by sect. 38, minutes are to be kept, and those minutes are made evidence; but they are not on that account the subject of a certiorari. The resolutions of town councils or railway boards must

(a) January 16th, and 26th. Before PATTESON, COLERIDGE, and WIGHTMAN, J.

be entered in minutes, which are for some purposes made evidence; but, not being judicial, these entries could no more be brought up by certiorari than the nonjudicial order of the Quarter Sessions in *Rex v. Lloyd*, or the resolution of the vestry appointing constables, In re Constables of Hipperholme. On the other side *Rex v. Inhabitants* — in Glamorganshire, 1 Ld. Raym. 580, is relied upon; but there the proceedings were judicial. The point decided was, that it was immaterial whether the jurisdiction was old or new; a decision quite consistent with *Rex v. Lloyd*. [PATTERSON, J.—The landowner, who wants an additional bridge, is first to apply to the Committee for their consent and approval. If they refuse, he may apply to the Commissioners for theirs. Do you go so far as to say that the Commissioners would be justified in giving their consent on an *ex parte* statement, and refusing to hear the Company in opposition?] They would. The application to the Commissioners is not *by way of appeal from the Committee. [*861 If the Committee grant a license it is sufficient; if they refuse, the license of the Commissioners is sufficient: but there is nothing in the act to require them to hear the parties unless they think fit. [WIGHTMAN, J.—You would say that they must hear the parties before they make an order, but not necessarily before they give a consent. COLERIDGE, J.—The nature of the proposed bridge might be injurious to the Company: as by being so low as to impede the traffic. It is fit they should have an opportunity of urging such an objection.]

Crompton then argued on the insufficiency of the objections raised by the affidavits.—Only two of these were decided upon by the Court: the first being that interested persons were sworn and acted as Commissioners; the second, that the meeting of Commissioners was not duly called, notice of it not having been given “at least sixteen days before.” The judgment of the Court makes it unnecessary to state the argument on these points in detail.

Pulling, *contra*.—The certiorari issued properly to bring up these proceedings. It lies wherever the proceeding is of a judicial nature; *Groenwelt v. Burwell*, 1 Salk. 144, 263. The proceedings in *Rex v. Lloyd* and In re Constables of Hipperholme were matters purely discretionary. But where the matter is not discretionary certiorari lies; *Regina v. Coles*, 8 Q. B. 75, 83, 86 (E. C. L. R. vol. 55). The present proceedings are like those in *Rex v. Inhabitants* — in *Gla- [*862 morganshire. Sect. 71, requiring notice before any meeting, shows that the business to be transacted there is considered judicial.

The argument proceeded thus far on January 16th. On its being resumed, January 26th,

PATTERSON, J., said: We are satisfied that this was a judicial act on the part of the Commissioners, and, therefore, that a certiorari lies.

Pulling was then heard on the several objections to the proceedings of the Commissioners.—On the question as to interest he cited *Regina*

v. The Cheltenham Commissioners, 1 Q. B. 467 (E. C. L. R. vol. 41), Regina v. The Justices of Hertfordshire, 6 Q. B. 753 (E. C. L. R. vol. 51), and Rex v. Jones, 2 Harr. v. Woll. (Bail Court) 298; and he contended that the actual conduct of the interested parties had shown a bias in them. *Crompton*, on this point, denied that any interest sufficient to disqualify any of the parties from acting was shown to have existed in fact; and he further urged that, if some few Commissioners were interested, the prosecutors could not now impeach the decision of so large a body on account of the accidental presence of one or two disqualified parties.

As to the advertisement, *Pulling* contended that a regular notice of the meeting was a fact which ought to have appeared on the face of the proceedings returned; Rex v. Bagshaw, 7 T. R. 363; Rex v. Mayor of Liverpool, 4 Burr. 2244; and that the notice here was not given *863] "at least sixteen days before" the meeting; for that the *day of notice and the day of meeting must be excluded; Regina v. The Justices of Shropshire, 8 A. & E. 173 (E. C. L. R. vol. 35); Regina v. Justices of Middlesex, 3 Dowl. & L. 109. [WIGHTMAN, J.—The words of stat. 33 G. 3, c. 95, s. 71, are very strong; that no meeting shall be had "unless" notice be given at least sixteen days before.] *Crompton*, on this point, referred to the documents before the Court, (a) by which it appeared that, although the Merthyr Guardian bore the date of January 27th, it was in fact circulated on the 26th: and he observed that there were well known cases of weekly publications in London which were dated on one day but published on another. He contended that the words "in pursuance of a summons and notice in the Merthyr Guardian newspaper of the 27th of January last" indicated a publication in the newspaper so dated, but did not necessarily mean that the notice was first published on that day: and that a notice, though misdated, would be good if shown to have been published in time. [WIGHTMAN, J.—The entry by the Commissioners is drawn up after receiving proof. It is not clear from the form of their entry (which mentions the newspaper "of the 27th") that they were satisfied of the notice having been published on the 26th.] *Crompton* also cited Ostler v. Cooke, 13 Q. B. 143 (E. C. L. R. vol. 66), and the judgment of Lord COTTENHAM in Taylor v. Clemson, 11 Cl. & Finn. 610, 645. And he referred to sect. 72 of stat. 33 G. 3, c. 95: but it was answered that the meeting now in question did not appear to have been convened under that section; and that the prohibitory words of sect. 71 applied to all meetings.

Cur. adv. vult.

*864] *PATTESON, J., now delivered judgment.

This was a motion to quash a judgment, determination, consent, and approbation of Commissioners under an Act of 33 G. 3, c. 95,

(a) See p. 857, ante.

for making the Aberdare canal, the same having been removed into this Court by writ of certiorari.

By the 10th section of that act, all persons having freehold or copyhold estates of 100*l.* per annum in Glamorganshire, and all persons resident in the county and having personal estate of 2000*l.* value, are made Commissioners for the settling, determining, and adjusting all questions, matters, and differences which shall or may arise between the Company and proprietors of lands: but that section, if it stood alone, seems to refer only to questions of compensation. By sect. 54 the Company are to make such bridges as the Commissioners shall from time to time judge necessary and appoint. By sect. 55, if owners or occupiers of lands shall find the bridge, which the Commissioners shall have directed to be made, insufficient for the commodious use and occupation of their lands, they may, with the consent and approbation of the Committee of the Company, upon request made to them, or, in case of their refusal for the space of twenty-one days after such request, then, with the consent and approbation of the said Commissioners, make bridges at their own expense.

In this case the trustees of the Marquis of Bute, being owners of lands adjoining the canal, made a request to the Committee for their consent to erect a bridge over the canal, and, after twenty-one days' refusal, applied to the Commissioners, who held a meeting, and, after hearing evidence and argument *pro and con, gave their consent [865 and approbation, as appears by a minute of their proceedings, returned under the writ of certiorari. It was contended for the trustees that this was not such a judicial act as could be brought up by certiorari. We gave our opinion on the argument, and are fully satisfied that it was a judicial act. The Company had refused their consent; and the Commissioners under the Act were manifestly intended to examine into the propriety of such refusal, and to determine the question judicially between the parties. The rule therefore which has been obtained by the trustees of Lord Bute to quash the writ of certiorari must be discharged.

Several objections were then taken to the proceedings of the Commissioners: one, which impeached their jurisdiction, others which turned on the forms of their proceedings. That which impeached their jurisdiction arose upon affidavits, from which it clearly appears that the proposed bridge is not required for the commodious use and occupation of the lands of Lord Bute as now occupied, no mines being worked under them, but for the purpose of bringing coals from a colliery adjoining those lands, called the Werfa Colliery, on the other side of them from the canal (which colliery is held by the trustees of Lord Bute under a lease, and underlet by them to a Mr. Nixon), by a railway to be made across the lands of Lord Bute, and by the proposed bridge across the canal, and so across other lands to a railway established by act of Par-

liament called the Aberdare Railway, which falls into and forms a junction with another railway, also established by act of Parliament, called the Taff Vale Railway, and so conveying the coals to Cardiff by the *866] railways *instead of the Aberdare Canal. It further appears that the two railways were under the same direction and management; that the chairman of the Taff Vale Railway, some of the directors, and several shareholders, were sworn and acted as commissioners upon the occasion in question; and, further, that the owner in fee of Werfa Farm and minerals also acted as a Commissioner.^(a) The Canal Company, therefore, object that these persons were interested in the question to be determined, and could not legally act as Commissioners, and that their doing so vitiated the proceedings. They ground their objection, not only on the general rule of law, but also on the 70th section of the Canal Act, "that no person shall be capable of acting as a Commissioner in the execution of this Act in any case where he shall be interested or concerned in the matter in question." We think it impossible to deny that the chairman and directors and shareholders of the Taff Vale Railway Company were interested and concerned in the question whether a communication should be opened between the Werfa Colliery and their railway; especially as it is shown by the affidavits that much other coal lay in the same neighbourhood. Doubts might well be entertained whether the owner in fee of the Werfa Colliery was so interested, since it is not shown upon what terms the trustees of Lord Bute hold their lease. Then, according to the cases of *Regina v. The Cheltenham Commissioners*, 1 Q. B. 467 (E. C. L. R. vol. 41), and *Regina v. The Justices of Hertfordshire*, 6 Q. B. 753 (E. C. L. R. vol. 51), the objection is fatal. We *867] do not mean to say that, when so large a body as these Commissioners are appointed by an Act of parliament,^(b) the accidental intrusion of one interested person would of necessity vitiate the proceedings; but this is a very different case, anything but accidental.

This being our opinion, we might pass unnoticed the objections as to the proceedings themselves. In truth most of them appear to us to be without weight; but there is one which is not so.

The 71st section provides that no meeting whatsoever of the said Commissioners shall at any time be held for putting in execution any of the powers or authorities vested in them by this Act, unless previous notice shall be given in some newspaper published or circulated within the said counties, or in such other manner as the said Company of pro-

(a) In one of the affidavits it was stated, on information and belief, that nearly all the persons who acted as Commissioners had been canvassed to attend by or on behalf of the parties interested in the colliery and railways.

(b) It appeared on affidavit, that, on 12th February, 101 persons took the oath and sat as Commissioners. COLERIDGE, J., observed, during the argument: "If you have a Court of almost all the freeholders in the county, how can you help some interest?" WIGHTMAN, J., said: "The question is, what you call an interest."

prietors shall direct or appoint, at least sixteen days before such meeting; and that no act, order, or proceeding of the said Commissioners, or any of them, in the execution of this act (except in such cases as are hereby otherwise directed), shall be valid unless the same shall be made or done at a meeting to be held in pursuance of this Act. Section 72 provides for the calling of a general meeting of the Commissioners at the request of the Company or of landowners, and directs notice to be given *in manner aforesaid*. The present case is not within the exception in section 71; and it appears that notice was given, by advertisement dated 27th January, 1849, in the Merthyr Guardian newspaper of that same day, for *a meeting to be held on the 12th February. The [*868 expression "at least sixteen days before" is held to mean sixteen days exclusive of the day of notice and the day of meeting; Regina v. The Justices of Shropshire, 8 A. & E. 173 (E. C. L. R. vol. 35), and the cases there referred to. Now there were only fifteen such days in this instance; the meeting therefore was not called pursuant to the Act; and the acts done at it were not valid.

To meet this objection, it was proved by a witness that the Merthyr Guardian newspaper, though dated on the 27th of January, is in truth circulated on the previous day, and, so, that the notice may well have been given on the 26th. But the notice itself is dated the 27th; the newspaper is dated the 27th; and, though it is printed the day before, and many copies may be sent out on the 26th, general publicity cannot fairly be said to be given to anything contained in it till the day of its date and general circulation. On this ground, therefore, as well as the former, we are constrained to say that the rule for quashing these proceedings must be made absolute; and costs must be given on both rules.

Rule absolute to quash proceedings.

Rule to quash certiorari discharged.(a)

(a) Reported in part by C. Blackburn, Esq.

***The Duke of RUTLAND v. WILLIAM BAGSHAW and** [*869
ARTHUR HEATHCOTE HEATHCOTE. Feb. 26.

Declaration in prohibition recited that plaintiff was not impropiator or proprietor of the tithes "in the parish of T.," and "the said T. had not been, nor was" a parish; and the chancel mentioned in the articles after set forth did not belong to the impropriate rectory in the articles mentioned; and plaintiff had not possession of the chancel. That there was (1) a custom in T. that the inhabitants should repair the chancel; (2) also a custom that, when repairs to the chancel had been necessary, the chapel-wardens of the chapelry had ordered and paid for the repairs, and plaintiff had not repaired or paid; (3) also a custom that church or chapel rates for the repairs of the church or chapel of T. had been made, collected, and expended within T. by the chapel-wardens thereof, and the repairs of the chancel paid for out of such rates by the chapel-wardens; (4) also a custom that the chapel-wardens had yearly passed their accounts to the inhabitants of T. of the moneys collected and expended by them on account of the church or chapel rates of T. It was further recited, that such tithes of T. as arose to plaintiff had always been collected by a person appointed by the tithe-payers within

T., which person had been rated to the church and other rates of T.; and the chapel-wardens of T. had been paid such rates, or deducted them from the tithes receivable by plaintiff: That plaintiff had agreed with the tithe-payers of T. to accept a certain sum in lieu of the tithes of T. arising to him, the remainder of such tithes to remain uncollected, and to be taken in lieu of all church and other rates due from plaintiff within T.; which agreement had for many years been acted upon. That defendants caused a suit to be promoted against plaintiff in the Archies Court of Canterbury, wherein they articled (among other things) that he was impropriator of the tithes arising "in the parish of T. aforesaid," which were sufficient for the repair of the chancel of the "parish church of T.;" that he was in possession of the chancel; that it was dilapidated by his default; and that he had been required by the churchwardens to repair it, but had refused: That to this libel defendant put in a negative issue, denying the allegations of the libel on articles, and also brought in his responsive allegation, which was duly admitted, and did thereby "allege the said several customs and matters in the introductory part of this declaration mentioned, in answer to the said libel on articles, and the said charge therein contained; and did then and there offer to prove the same in due form of law;" yet defendant threatened to, and would, "prosecute the trial of the said several customs and matters in the introductory part of this declaration mentioned in the said Court Christian," unless writ of prohibition, &c.

Defendants pleaded only a traverse of allegation (1) of custom, and a traverse of allegation (3) of custom. On these traverses issues were joined, which were found for defendants.

On motion for judgment, non obstante veredicto. Held:

1. That the pleas were not bad for omitting to traverse the allegations (2) and (4) of custom, these being immaterial, or merely incidental to and evidence of the allegations of custom traversed.
2. That the pleas were an insufficient answer, inasmuch as they did not meet the allegation that T. was not a parish, which was a fact not triable by the Ecclesiastical Court.
3. That there ought, therefore, to be a judgment non obstante veredicto, inasmuch as, the plaintiff not having proved the allegations traversed, there was no admission on the record of the allegations not traversed.

THIS was an action of prohibition, tried before Lord DENMAN, C. J., at the Summer assizes, 1848, for Derbyshire. A verdict having been found for the *defendants, and a motion made, in the ensuing *870] Michaelmas term, for judgment non obstante veredicto, the Court granted a rule Nisi, ordering that a case should be stated and set down in the special paper: and the following case was stated accordingly.

The declaration, after stating that the plaintiff complained of the defendants, who had been summoned to answer the plaintiff of a plea wherefore they prosecuted him in the Court Christian, proceeded thus: For that, whereas, before or at the time of the exhibiting the libel on articles hereinafter mentioned, *the plaintiff had not been, nor was, impropriator or proprietor of the tithes annually arising or renewing in the parish of Taddington* and the titheable places within the same; and *the said Taddington*, in the said articles mentioned, *had not been nor was a parish*; and the chancel, in the said articles mentioned, had not, nor did belong or appertain to the said impropriate rectory, in the said articles mentioned, nor had been, nor was, part or parcel of the said impropriate rectory: and plaintiff had not been, nor was, by himself, his lessees or assigns, in possession of the said chancel in the said articles mentioned: nor was the same held, occupied, or enjoyed by the plaintiff, his lessees or assigns: And whereas also, from time whereof, &c., until the time of the exhibiting the said libel on articles, there has been and still is, *a certain ancient and laudable custom*, used and approved of within the said Taddington in the said articles mentioned, that is to

say: that the inhabitants of Taddington aforesaid, from time to time, whenever the same should be requisite, repair, or cause to be repaired, at their own proper cost and charge, the said chancel in the said *articles mentioned; and have, from time to time, at all times, [*871 from time whereof, &c., in fact repaired, or caused to be repaired, and still of right ought, &c., the said chancel, at their own proper cost and charge, whenever any repairs thereof have been or may be requisite: And whereas also, from time whereof, &c., until the time of the exhibiting, &c., there has been, and still is, *a certain other ancient and laudable custom*, used and approved of within the said Taddington in the said articles mentioned, that is to say: that, when and as any repairs in and to the said chancel have been necessary, the chapelwardens of the said chapelry have given orders and directions for the doing of such repairs, and have at various times employed or caused to be employed divers workmen and labourers in and about the doing of such repairs; and have, from time to time, paid for the doing of such repairs, and also paid such workmen and labourers for the work and labour in and about the doing of such repairs: And whereas also, neither the plaintiff nor any of his ancestors or predecessors, lessees or grantees of any tithes arising within Taddington aforesaid, had, nor hath any of them at any time before the exhibiting the said libel on articles, repaired or caused to be repaired the said chancel in the said articles mentioned, or any part thereof, or defrayed the cost of any of the reparations made or done in or to the said chancel: And whereas also, from time whereof, &c., until the time of the exhibiting, &c., there has been, and still is, *a certain other ancient and laudable custom*, used and approved of within the said Taddington in the said articles mentioned, that is to say: that church or chapel rates for the repairs of the said church or chapel of Taddington *have been from time to time [*872 duly made, and have been collected and expended within Taddington aforesaid, by the chapel-wardens thereof for the time being; and all the costs and expenses of the repairs of the said chancel have been at all times provided for and paid out of such rates by the said chapel-wardens of the said chapelry for the time being: And whereas also, from time whereof, &c., until the time of the exhibiting, &c., there has been, and still is, *a certain other ancient and laudable custom*, used and approved of within the said Taddington in the said articles mentioned, that is to say: that the chapel-wardens of Taddington aforesaid for the time being have, yearly and every year, kept, made up, exhibited, and passed their accounts, with and to the inhabitants of Taddington aforesaid, of the various moneys collected and expended by them on account of the church or chapel rates of Taddington aforesaid, or as such chapel-wardens as aforesaid: And whereas also such of the tithes of Taddington aforesaid as arose to plaintiff had always, before and until the exhibiting, &c., been collected by a person selected or appointed by

the tithe-payers within Taddington aforesaid; and the same person had always been theretofore made liable, or rated, to the church and other rates of Taddington aforesaid; and the said rates been always paid to, or deducted from the tithes receivable by the plaintiff by, the chapel-wardens of Taddington aforesaid, or some person on their behalf: And, some years before the exhibiting, &c., plaintiff agreed with the tithe-payers of Taddington aforesaid to accept the sum of 70*l.* per annum in lieu of such of the tithes of Taddington aforesaid as arose to him, *873] plaintiff, and that the remainder of such tithes, amounting to the *sum of about 15*l.* per annum, should remain uncollected, and be taken in lieu of all church and other rates due from him, plaintiff, within Taddington aforesaid; and such agreement had, for many years before and until the exhibiting, &c., been in force and acted upon: And whereas also defendants, before the commencement of this suit, to wit, on 12th December, 1846, caused a suit in a certain Court Christian, that is to say, in the Arches Court of Canterbury, to be promoted against plaintiff; and, in the said suit, caused to be exhibited in the said Court, to wit, on the same day and year, a certain libel on articles against the now plaintiff, in the name of Sir Herbert Jenner Fust, Knight, Doctor of Laws, Official Principal of the Arches Court of Canterbury, whereby and wherein the said Official Principal objected, articulated, and administered according to the tenor and effect of the articles following, that is to say:

First: We article and object to you, the said John Henry Manners, Duke of Rutland, that you do know, believe or have heard, that, of common right, and by the laws and constitutions ecclesiastical of this realm of England, the rectors and impropiators of rectories, or of any part or portion thereof, are bound to sustain and amend the chancel of the parish church of their respective rectories, and to defray all costs, charges, and expenses to be incurred in the sustaining, repairing, and amending the chancels aforesaid, out of the tithes, profits, and emoluments of their respective rectories belonging: and this was and is true, public, and notorious: and we article and object everything in this and the subsequent articles contained, jointly and severally.

*874] Second: We article, &c., that you were, in the year *1846, and for some time prior thereto, and are now, impropiator or proprietor of the tithes annually arising or renewing in the parish of Taddington aforesaid, and the titheable places within the same, and have received all the advantages, profits, and emoluments of the impropriate rectorial or great tithes annually arising, renewing, and increasing in the said parish of Taddington, within the peculiar jurisdiction of the Dean and Chapter of the Cathedral church of Lichfield, and the titheable places of the same: and this was, &c.: and we article and object as before.

Third: We article, &c., that the yearly value or estimation of the

impropriate rectorial tithes arising, renewing, and increasing within the said parish of Taddington and the titheable places of the same, belonging to you, were, and have been during all the time that you have possessed the same, sufficient for the sustaining, upholding, maintaining, and repairing the chancel of the said parish church of Taddington, and the appurtenances thereof; and this was, &c.: and we article, &c.

Fourth: We also article, &c., that, among other possessions, the chancel of the parish church of the said parish of Taddington, particularly mentioned in the presentment hereunto annexed, marked A, which presentment we will to be here read and inserted and taken as part and parcel hereof, did belong and appertain to the said impropriate rectory for time beyond the memory of man, and was, and is, and has been, part and parcel of the said impropriate rectory, and, for and during the time aforesaid, has been commonly accounted, reputed, and taken so to belong: and this was, &c.: and we article, &c.

Fifth: We also article, &c., that you, by yourself, *your lessees or assigns, were, in the said year 1846, and for many years [*875 prior thereto, and are now, in possession of the said chancel in the said presentment mentioned; and the same is now held, enjoyed, and occupied by you, your lessees or assigns: and this was, &c.: and we article, &c.

Sixth: Also, we article, &c., that the chancel of the parish church of Taddington aforesaid, in the said presentment mentioned, is very much dilapidated and decayed through the default and neglect of you, the said J. H. M., Duke of R., and continues in a ruinous condition, suffering very great damages, as in the said presentment is mentioned: and we article and object concerning any other damages or dilapidations, and such as shall hereafter appear in the proofs to be adduced in the cause: and this was, &c.: and we article, &c.

Seventh: We also article, &c., that you have been often, or at least once, by and on behalf of the said William Bagshaw and Arthur Heathcote Heathcote, the churchwardens aforesaid, asked and required to repair, or cause to be repaired, the damages and dilapidations aforesaid, as contained in the said presentment, in the chancel of the said parish church of Taddington: but you have refused, and still do refuse, or at least have delayed, and do still delay, to repair the same: and this was, &c.: and we article, &c.

Eighth: We also article, &c., that you now are, or ought to be, by us and our authority compelled to the reparation of the aforesaid damages and dilapidations: and this was, &c.: and we article, &c.

Ninth: We also article, &c., that the said W. Bagshaw and A. H. Heathcote, the churchwardens aforesaid, have rightly and duly complained of all and *singular the premises: and that, by reason of the premises, and the letters of request presented to and ac-

cepted by us in this cause, you were and are subject to the jurisdiction of this Court: and this was, &c: and we article, &c.

Tenth: We also article, &c., that all and singular the premises were and are true, public, and notorious, and thereof there was and is a public voice, fame, and report; of which legal proof being made, we will that right and justice be effectually done and administered therein; and that you, the said J. H. M., D. of R., be by canonical censures monished to repair the damages and dilapidations aforesaid in the chancel of the parish church of Taddington aforesaid, and be condemned in all the lawful costs made and to be made in this cause on the part and behalf of the said W. Bagshaw and A. H. H., by us or our definitive sentence or final decree to be made and interposed in this behalf.

And whereas, the said Duke afterwards, to wit, on the same day and year, duly appeared in the said Court Christian to answer the said libel on articles, and the said charge therein contained; and did afterwards, to wit, on, &c., put in and plead in the said Court Christian *a negative issue to the said libel on articles, thereby denying the allegations of the said libel on articles, and did afterwards, to wit, on, &c., bring into the said Court Christian his responsive allegation to the same libel on articles; which same responsive allegation was, to wit, on, &c., duly admitted; and did thereby and then, amongst other things, allege the said several customs and matters in the introductory part of this declaration mentioned, in answer to the said libel on articles, and the said charge therein contained; and did then and there offer to prove the same in due form* *877] *of law; nevertheless defendants, well knowing the premises,* but contriving to aggrieve plaintiff, and to withdraw the cognisance and trial of the several customs and matters in the introductory part of this declaration mentioned, which to our Lady the Queen, and not to the Court Christian or any of them belongs, to another examination in the said Court Christian, threaten the plaintiff to prosecute, and are about to and will prosecute, the trial of the said several customs and matters in the introductory part of this declaration mentioned in the said Court Christian, unless writ of prohibition, &c., be directed to the said Official Principal, &c.: therefore plaintiff says that he is damned, &c., and prays that a writ of prohibition, &c., be awarded and issued against the said Official Principal, &c.

The defendants' pleas were as follows:

The defendants, by, &c., say: That there has not been, from time, &c., until the time of exhibiting the said libel on articles, nor is there, the said certain ancient and laudable custom, used and approved of within the said Taddington, that is to say, that the inhabitants of Taddington aforesaid from time to time, whenever the same should be requisite, should repair or cause to be repaired, at their own proper costs and charge, the said chancel in the said articles mentioned, and have from time to time, at all times whereof, &c., in fact repaired, or

caused to be repaired, and still of right ought, &c., the said chancel, at their own proper cost and charge, whenever any repairs thereof have been or may be requisite, in manner and form as in the declaration is alleged: and of this, &c.: conclusion to the country. And they pray judgment and that a writ of prohibition may not issue. And, for a further plea, defendants say that *there has not been, for time, [*878 &c., until the time of exhibiting, &c., nor is there, the said certain ancient and laudable custom, used and approved of within the said Taddington, that is to say, that all the costs and expenses of the repairs of the said chancel have been at all times provided for and paid out of the said rates, in manner, &c.: conclusion to the country, &c. (as before).

To these pleas the similiter was added.

The question for the opinion of the Court was, Whether judgment non obstante veredicto should be given for the plaintiff or not. If it was, the rule obtained was to be made absolute: if not, it was to be discharged, with the same effect, in all respects, as if the rule had been argued and decided in the new trial paper.

The case was argued in last Easter term.(a)

Cowling, for the plaintiff in prohibition.—By the first and second articles of the libel the suit in the Arches Court rests upon the alleged fact that Taddington is a parish of which the plaintiff is improper rector. The declaration denies that the plaintiff is such rector, and that Taddington is a parish at all. These denials are left untraversed by the plea. It further appears, by the declaration, that both these denials were contained in the responsive allegation to the articles, and the responsive allegation was admitted in the Arches Court, which means that it was not demurred to, but that the parties were put to their proofs. There is therefore a question of fact raised on the parochiality at that stage; and a prohibition must go, if the parochiality cannot be tried in the Ecclesiastical *Court; *Byerley v. Windus*, 5 B. & C. [*879 1, 23 (E. C. L. R. vol. 11), where the practice is explained in the judgment. Now the Ecclesiastical Court cannot try the question of fact whether Taddington be a parish or not: the bounds of a parish are matter of prescription (in default of statutable definition, which is not shown on this record); and the whole question is one of immemorial usage. [COLERIDGE, J.—I think parishes have been sometimes erected by the ordinance of the bishop. Are you entitled to assume that the same rule applies to the question whether a place is a parish at all, and the question what the boundaries are of a place known to be a parish?] The one question must involve the other: it is impossible to show that a place is a parish, without showing what the place is, that is, what are the parochial boundaries. If a bishop created a parish

(a) May 9th, 1849. Before PATTESON, COLERIDGE, and WIGHTMAN, Jrs. COLERIDGE, J., left the Court during the reply.

(which cannot have been done within the time of legal memory), he must have defined the boundaries of the parish so created. That the Spiritual Court cannot try the question of bounds of a parish appears from 17 Vin. Abr. 581, tit. *Prohibition* (L), pl. 1, 2, 4, 5; and placita, 2, 3, 5, in that section show also that there is the same incapacity to try the question of parish or no parish. A similar objection was held to support a prohibition in *Dolby v. Remington*, 9 Q. B. 179 (E. C. L. R. vol. 58); and the plea to the declaration in prohibition was held bad on demurrer for leaving unnoticed the allegations which showed that the parties were at issue upon the question whether F. was a distinct parish from L. Here, also, of four customs alleged in the declaration, the plea denies only two: it therefore appears on the record that the

*880] Spiritual Court will try two customs, if not *prohibited. [WIGHTMAN, J.—I do not see how you are to have judgment non obstante veredicto upon this finding on the traverse. There must be a confession for that.] In *Couling v. Coxe*, 6 Com. B. 703 (E. C. L. R. vol. 60), the defendant took an immaterial traverse which was found for him; and it was held that the plaintiff was entitled to judgment non obstante veredicto, and that he was not limited to a repleader: and the same rule was acted upon in *Crossfield v. Morrison*, 7 Com. B. 286 (E. C. L. R. vol. 62). [*Willes*, for the defendants.—In those cases there were other material issues which were found for the plaintiffs. PATTESON, J.—It appears from *Plummer v. Lee*, 2 M. & W. 495,† that, where there is no confession in any part of the record, there cannot be judgment non obstante veredicto: and that is consistent with *Goodburne v. Bowman*, 9 Bing. 532 (E. C. L. R. vol. 23).] The plaintiff would be entitled to a repleader at any rate. The rule for judgment non obstante veredicto may be remoulded, if necessary; *Fillieul v. Armstrong*, 7 A. & E. 557 (E. C. L. R. vol. 34). But, if the pleas be such that there must have been judgment for the plaintiff on general demurrer, he is entitled to judgment non obstante veredicto. That the issues are found for the defendants cannot put the plaintiff in a worse position than he would be placed in by the admission he would have made by demurring. In *Down v. Hatcher*, 10 A. & E. 121 (E. C. L. R. vol. 37), there was but one plea; and on that the issue was found for the defendants: but, because it offered a defence which did not meet the whole claim, the plaintiff had judgment non obstante veredicto. Here the case is the stronger, because the allegations are distinct. [WIGHTMAN, J.—Can you sign judgment for the part which is unanswered?] That

*881] *cannot be done, because the plea does profess to answer all, though it fails to do so legally. *Negelen v. Mitchell*, 7 M. & W. 612,† supports *Couling v. Coxe*, and *Crossfield v. Morrison*, and expressly overrules *Plummer v. Lee*. [WIGHTMAN, J.—In *Atkinson v. Davies*, 11 M. & W. 236, 242,† it was said by the Court: “The opinion of all the

judges in the case of *Gwynne v. Burnell*, 6 New Ca. 453, (a) that judgment non obstante veredicto can be awarded on a pleading by the defendant in confession and avoidance only, and not on the implied confession in a rejoinder of the part of a replication which it does not answer, seems to lead to the conclusion that the judgment for the plaintiffs could not be arrested, on the ground that the traverse of a part of a plea contains an implied confession of the residue. The proper course seems in both cases to award a repleader." It is said in Gilbert's Hist. Com. Pl. p. 157: "If a man justifies to the whole, and his plea goes but to part, the plea is bad, because being pleaded as to the whole, and going but to part, and being an insufficient answer to the whole, consequently the plaintiff must have judgment; and if the plaintiff on such plea does not demur, but takes issue, since he takes issue on a bad bar, whether the issue be found for the plaintiff or defendant, the judgment shall be for the plaintiff, because the bar is insufficient; for though the issue should be found for the defendant, yet that will not amend the bar, and make that go to the whole, which goes to part only; and therefore here the issue *is material." [WIGHTMAN, J.—That is the case of a justification, which expressly confesses all the complaint, though it suggests an answer to part only.] The principle cannot be confined to a justification. The law on this point is discussed in notes (6), (f), (g), (h), to *Bennet v. Holbech*, 2 Wms. Saund. 319 c. d. (6th ed.); and the leading case is *Staple v. Heydon*, 6 Mod. 1, 2, S. C. 1 Salk. 173, 216, 2 Salk. 579, 3 Salk. 121, Holt, 217, 1 Ld. Raym. 707, 2 Ld. Raym. 922, where it is said that "a repleader is to be awarded when such an issue is joined, as the Court after trial thereof cannot give a judgment, as being impertinent or uncertain, and not determining the right." But here an answer is given which is, not uncertain or indecisive, but insufficient. It will be said that in *Negelen v. Mitchell*, and other cases in which judgment non obstante veredicto was given upon an immaterial plea found for defendants, there were other pleas on the record. But those could not supply the want of a confession in the immaterial plea; each plea must be taken by itself. *Negelen v. Mitchell* is therefore an authority showing that there may be judgment non obstante veredicto without any confession on the record beyond that which is implied from the allegation being left unanswered. [WIGHTMAN, J.—The material facts were there all found for the plaintiff; he could not be prevented from having judgment by the addition of an immaterial plea. PATTESON, J.—In note (h) to *Bennet v. Holbech*, 2 Wms. Saund. 319 e (6th ed.), it is said: "It should be observed that in order to found the judgment on a confession, by the defendant's pleading, of the cause of action, such pleading must be

(a) In Dom. Proc., reversing the judgment of Exch. Ch. in *Gwynne v. Burnell*, 2 New Ca. 7; which had affirmed the judgment of Com. P. in *Collins v. Gwynne*, 9 Bingh. 544.

*883] in confession and *avoidance; for though, if a defendant traverses one of several traversable allegations in a declaration or replication, he admits, for some purposes," "those which he does not traverse, yet he does not confess them in a sense which is required to found a judgment non obstante veredicto;" "or to be a ground for arresting judgment for the plaintiff." That is followed up in *Couling v. Coxe*, and *Crossfield v. Morrison*, where judgment proceeds on the ground that upon other pleas there was a finding for the plaintiff.] That was not the exclusive ground of these judgments: in *Couling v. Coxe*, 6 Com. B. 721 (E. C. L. R. vol. 60), WILDE, C. J., calls the plea "a conditional admission."

Willes, contrâ.—Two objections of substance are made to the pleas. First, that certain customs are left untraversed, the declaration alleging four, and two only being noticed in the pleas. Now if the declaration be not repugnant, the whole must be taken as showing a single custom; and then it is enough for the defendants in prohibition to traverse any material part of such entire custom. Each of the two pleas traverses one such part: if those parts fail, what is untraversed is of no importance. One plea denies that the inhabitants repaired the chancel by custom: the other, that the costs are customarily paid out of the rates. Assuming these denials to be founded in fact, the other alleged customs, or parts of the integral custom, namely, that the chapel-wardens had in fact paid for repairs, and that the chapel-wardens had annually accounted

*884] to the inhabitants for the moneys laid out from the rates, *amount, at the utmost, to no more than evidence respecting the truth of that which is traversed. That the custom which is traversed, for the inhabitants to repair the chancel, might legally exist, there is no doubt; *The Bishop of Ely v. Gibbons*, 4 Hag. Eccl. R. 156. Secondly, it is objected that the defendants have not traversed the fact that Taddington is not a parish. But that is a question which the Ecclesiastical Court might try. The prohibition for incapacity to try is founded on the differences which exist, in some cases, as to the rules of proof, between the civil and ecclesiastical Courts; a custom is such a case; freehold is another; instances are to be found in 18 Vin. Abr. 16, 17, tit. *Prohibition* (U), pl. 4, 17, 18; but where there is no such difference, and the matter is merely incidental to a cause properly commenced in the Ecclesiastical Court, it may be tried there; *Ib.* pl. 16, 26; *Clifton v. Oates*, 2 Bulst. 283. Thus if proceedings be taken for the purpose of deprivation, on account of an offence committed against the criminal law, the Ecclesiastical Court may try the question of crime, whether the crime be a felony or a misdemeanor; *Waddilove's Digest*, 191, citing *Burder v. Hodson*.(a) *Nash v. Nash*, 1 Hag. Con. Ca. 140, and *Wilkinson v. Gordon*, 2 Add. 152, are also cited there as to the pleading of facts which are matter of criminal charge, in

(a) *Burder v. —*, 3 Curt. Ecc. 822, in which case a rule for a prohibition was discharged by the Court of Q. B.; *Waddilove's Dig.* 191.

an ecclesiastical suit. [COLERIDGE, J.—What do you say is the principal matter here?] The liability of the plaintiff in prohibition to repair the chancel: the question of parish or no parish is merely incidental to that. And, again, the only way in which it is sought to show this latter *question to be without the jurisdiction of the Ecclesiastical Court is by arguing that it involves, incidentally, the question [*885 as to the bounds of the alleged parish. Even the objection to trying the boundaries as a principal question applies only to what are strictly parishes: the boundaries of a vill within a parish may be tried in the Ecclesiastical Court; *Petler v. Yaleman*, 1 Lev. 78. The explanation of the distinction is probably no more than this; that the Courts, in the time of Charles 2d, were unwilling to extend the doctrine of prohibition, though they did not feel warranted in disregarding what had been positively decided in times more adverse to the jurisdiction of the Spiritual Court. A parish may be created by act of parliament, in which case no custom would come in question. The declaration does not suggest that any question arose whether a particular place is or is not within Taddington. It may be questioned also whether, in the present case, it does sufficiently appear to this Court that the question whether Taddington is or is not a parish is raised in the Spiritual Court. In *Byerley v. Windus*, 5 B. & C. 1 (E. C. L. R. vol. 11), the declaration in prohibition set out the personal answer. In *Dolby v. Remington*, 9 Q. B. 179 (E. C. L. R. vol. 58), also, the declaration set out the personal answer, which contained a direct denial of the fact said not to be triable in the Spiritual Court. Here the declaration first recites that the plaintiff in prohibition is not impropiator of the tithes “in the parish of Taddington,” and that “the said Taddington” is not a parish. That is a somewhat equivocal mode of averment: it is not even said that there may not be a parish of another name in which *the parish church in question lies and to which it belongs: [*886 but, at any rate, it does not show that the question of fact is raised in the Spiritual Court. It is true that afterwards the declaration states that the plaintiff in prohibition put in a negative issue in the Spiritual Court, denying the allegation of the libel, and also brought in his responsive allegation, “and did thereby and then, amongst other things, allege the said several customs and matters in the introductory part of this declaration mentioned, in answer to the said libel on articles, and the said charge therein contained; and did then and there offer to prove the same in due form of law.” But that general statement is not sufficiently explicit to show that a definite question of fact was raised as to the parochiality. Hardly any question of fact can be suggested as to which there is less probability of a different conclusion being arrived at by the two Courts.

As to the question of form: there can be no judgment non obstante veredicto unless there is a confession, either on the plea said to be

insufficient, or (as seems to have been first suggested in *Goodburne v. Bowman*, 9 Bing. 532 (E. C. L. R. vol. 17)), on some other plea. In *Dolby v. Remington* the question arose on demurrer: the case therefore is inapplicable as to this point.

Cowling, in reply.—The argument that there is but one custom would show that the defendant has traversed more than he is entitled to traverse. But there are four customs: whether they are repugnant or not is immaterial, if the Spiritual Court is proceeding to try any. The first and second are very different customs, *and would be established
*887] by different proofs. As to the question of parochiality, it is argued that this may perhaps be shown by some proof not resting on immemorial custom. But it is sufficient ground for prohibition that immemorial custom may come in evidence on such a question; at any rate in the absence of something to show that it will not. The authorities already cited show that the inability to try a question of boundary carries with it an inability to try a question of parish or no parish.

Cur. adv. vult.

PATTESON, J., now delivered the judgment of the Court.

The plaintiff in this case declared in prohibition of a suit in the Court Christian by the defendants, as churchwardens of the parish of Taddington, in the county of Derby, against the plaintiff, as impropiator of the tithes of the parish, for non-repair of the chancel of the parish church.

The plaintiff, amongst other matters, alleged in his declaration that there was a custom that the inhabitants of Taddington should repair the chancel, and also another custom that the cost of such repair should be paid out of a rate made for that purpose by the churchwardens of Taddington. The defendants, by their plea, traversed each of these customs, and upon the trial obtained a verdict upon both their traverses.

The plaintiff moved for judgment non obstante veredicto, on the ground that, independently of the allegations of custom which had been traversed, there was matter unanswered in the declaration sufficient to entitle him to a prohibition. This was denied by the
*888] *defendants. And it was further contended that, the pleas being traverses only, there could not be judgment non obstante veredicto, but merely a replader.

Besides the matters traversed, the declaration alleges that the plaintiff was not impropiator of the tithes; that *Taddington was not a parish*; that the chancel did not belong to the inappropriate rectory; that there was a custom that, when the chancel wanted repair, the chapel-wardens of Taddington ordered and paid for the repairs of it; that neither the plaintiff or his predecessors ever repaired the chancel; that there was a custom that the chapel-wardens of Taddington accounted to the inhabitants for the money collected and expended by them on account of chapel rates, or as chapel-wardens; that church

rates had always been paid in respect of the tithe of Taddington; and that the plaintiff had agreed to accept 70*l.* for his tithe, and leave the rest, amounting to about 15*l.*, to be taken in lieu of church and other rates; and that the Court Christian was proceeding to try and determine such matters, in derogation of the courts of common law.

The question is, whether any of the matters so alleged, and not traversed, in the pleadings in prohibition, were such as could not properly be tried in the Ecclesiastical Court.

It was contended for the plaintiff that the two customs, one that the chapel-wardens of Taddington ordered and paid for the repairs of the church of Taddington, and the other that the chapel-wardens of Taddington accounted to the inhabitants for the money collected and expended by them on account of chapel rates, or as chapel-wardens, were triable only in the temporal courts; and that, as they were not traversed *by the defendants in their plea to the declaration, the plaintiff was entitled to a prohibition on that ground. [*889

The Court Christian undoubtedly cannot try a custom: but there is no ground for a prohibition if the alleged custom be wholly immaterial to the question to be determined, so that it is perfectly indifferent which way it is found. In the present case it appears to us that the two customs which the defendants have not traversed are in effect merely incidental to, and evidence in support of, the customs which were traversed; or that they are immaterial and irrelevant to the question to be decided. The liability of the plaintiff to repair the chapel would not be avoided by a custom that, when repairs were wanted, the chapel-wardens ordered and paid for them, or by another custom that the chapel-wardens accounted to the inhabitants for the money collected and expended by them on account of chapel rates, even if these customs were found for the plaintiff, as it is not alleged that the repairs were paid for out of the chapel rates, or that they were done at the cost of the inhabitants: and, it having been found by the jury that there was no custom for the inhabitants to repair, or for the repairs to be paid for out of the chapel rates, we are therefore of opinion that the omission to traverse those customs, and leaving them to be dealt with by the Spiritual Court, affords no ground for a prohibition.

It was also contended that the plaintiff was entitled to a prohibition on the ground that the question, whether Taddington was or was not a parish, was raised and left for trial in the Spiritual Court; and that it ought to be tried by the common law.

Upon the argument, it was hardly disputed for the *defendants, and indeed it seems to be settled law, that the boundaries of [*890 parishes are to be tried in the temporal and not in the spiritual Courts; *Dolby v. Remington*, 9 Q. B. 179, 196 (E. C. L. R. vol. 58), *Brown v. Palfry*, 3 Keb. 286, *Petler v. Yalman*, 1 Lev. 78, and the cases cited upon the argument from 17 Vin. Abr. 581, tit. *Prohibition* (L): and,

if that be so, it is difficult to distinguish between the question of parish or no parish, and the boundaries of a parish. The reason assigned by Lord HALE, in *Brown v. Palfry*, for taking a question of the boundary of a parish from the Ecclesiastical Court, is, that it depends upon prescription; which would be equally applicable to the question of parish or no parish. It is said in 2 Ro. Ab. 291 (*d*) that, if it be a question in the Ecclesiastical Court, whether a church be a parish church or a chapel of ease, a prohibition lies. We therefore think that in the present case the question whether Taddington was a parish was not properly triable in the Ecclesiastical Court. The plea to the declaration in prohibition leaves the allegation that Taddington was not a parish wholly unanswered; and the allegations in the libel by which it is sought to charge the plaintiff are such as to make that a material question; and the plaintiff is entitled to judgment non obstante veredicto unless the omission to take issue upon that allegation in the declaration is a ground for a repleader only.

The defendants, by their plea, have only traversed two of the allegations in the declaration, leaving wholly unanswered an allegation which we think would entitle the plaintiff to a prohibition. The issues found for the defendants, therefore, constitute no sufficient answer to *891] the declaration, and are in that respect immaterial; and, being traversed merely, contain no admission of the allegations not traversed, except, as is expressed in the judgment of the Court of Common Pleas in *Couling v. Cox*, 6 Com. B. 703, 721 (E. C. L. R. vol. 62), "a *conditional* admission, that is, as admitting the allegation not traversed, *in case the plaintiff can prove the allegation traversed*." In the present case, the plaintiff did *not* prove the allegations traversed: and we therefore think that there is no such admission by the defendants of the matters alleged in the declaration as will entitle the plaintiff to judgment non obstante veredicto. And therefore there must be a repleader.

Repleader awarded.

ELIZABETH RUSSELL, Executrix, &c., of THOMAS RUSSELL,
Clerk, v. Sir THOMAS PHILLIPS, Baronet. Feb. 11.

A bill of exchange, drawn 28th November, 1836, payable forty-two months after date, was accepted thus: "Accepted on the condition of its being renewed until November 28th, 1844, without interest, payable by me at Messrs. Williams and Deacon's, bankers, London."

Held, in an action by endorsee against acceptor, that this was a good acceptance, and was that the bill properly declared on as accepted payable on 28th November, 1844.

An acceptance of a bill of exchange must be to pay in money; and an acceptance to pay by another bill is no acceptance.

. ASSUMPSIT. The first count alleged that one Thorpe, on 28th Novem-

ber, 1836, in the lifetime of T. Russell, made his bill of exchange, directed to defendant, and thereby required defendant to pay to his (Thorpe's) order 500*l.*, forty-two months after the date thereof: that defendant then "accepted the said bill, payable on the 28th of November, 1844, without interest:" and that Thorpe, in the lifetime of *T. Russell, endorsed to T. Russell. There were three other [*892 counts on three other bills respectively drawn for the same amount, accepted by the defendant and endorsed to T. Russell: and a count (which became immaterial) on an account stated.

1st. Plea to the first count. That the said supposed acceptance of the said bill was a certain writing written across the said bill on the face thereof, and signed by the defendant, which said writing was as follows: "Accepted on condition of its being renewed until November 28th, 1844, without interest, payable by me at Messrs. Williams & Deacon's, Bankers, London. THOMAS PHILLIPS." That the said bill was not, nor was the acceptance thereof, renewed until the 28th day of November, 1844, or at all; nor was any bill ever presented to defendant for acceptance by way of such renewal as aforesaid; without this, that defendant accepted the said bill payable on the 28th day of November, 1844, *modo et formâ*. There were similar pleas as to the acceptances alleged in the other three counts. Issues were joined on these pleas.

The cause was tried, before WILDE, C. J., at the Surrey Spring Assizes, 1847, when a verdict was found for the plaintiff for the damages in the declaration, subject to the opinion of this Court upon a special case; the Court to have the same power of amending the record, if necessary, and if the Court should think proper, that a judge at Nisi Prius would have.

The case set out several letters with reference to the account stated; and it also set out the bills and acceptances mentioned in the declaration. It is sufficient to give the form of the bill and acceptance *mentioned in the first count, as the question was the same as to [*893 all the acceptances.

"500*l.*

London, November 28th, 1836

Forty-two months after date pay to my order five hundred pounds for value received.

THOS. THORPE."

The bill was directed to the defendant, who had written across the face of the bill as follows:—

"Accepted on the condition of its being renewed until Nov. 28th, 1844, without interest, payable by me at Messrs. Williams and Deacon's, Bankers, London.

THOMAS PHILLIPS."

It was agreed that the record and pleadings should be taken as part of the case. Either party was to be at liberty to apply to the Court to turn the special case into a special verdict: the Court to be at

liberty to draw any inference from the facts set forth which a jury might draw.

If this Court, or a Court of error (on special verdict), should be of opinion on the above statement that the plaintiff was entitled to recover, upon the record in its present form or in any other form to which the Court might order it to be amended, the whole or any part of the amount claimed, then the verdict was to stand and the damages to be reduced accordingly. If this Court, or such Court of error, should be of opinion that the plaintiff was not entitled to recover any portion of the amount claimed on the record as it then stood, or as it might be amended, the plaintiff was to be at liberty, at any time after judgment given, to elect to be nonsuited, and to have a nonsuit entered accordingly; *otherwise the present verdict to be set aside and a
*894] verdict entered for the defendant.

The case was argued in last Michaelmas vacation.(a)

Fortescue, for the plaintiff.—The defendant must contend, either that the alleged acceptance is no acceptance, or that it is incorrectly described in the declaration. An acceptance is good although conditional or qualified, or varying from the tenor of the bill. "An acceptance is also either absolute or conditional, and either according to, or varying from the tenor of the bill;" Bayley on Bills, 177, 6th ed. In *Walker v. Atwood*, 11 Mod. 190, a bill was drawn on the 8th April upon the defendant, who accepted it payable on a subsequent day. The defendant demurred, on the ground that, as no time was prescribed by the drawer for payment, the bill was payable at sight; but the Court held this a good acceptance within the custom of merchants. In *Petit v. Benson*, Comberb. 452, the defendant accepted the bill "to be paid, half in money and half in bills:" the question was whether there could be a qualification of an acceptance; and it was proved by divers merchants that there might; for that, as the drawee might refuse to accept at all, so he might accept in part. Of course the drawer may reject a qualified acceptance; or he may adopt it by suing upon it. What then is the effect of the qualified acceptance in this case? The words, "on condition of its being renewed until November 28th, 1844," mean, on
*895] condition of the time for payment of the *same bill being extended to that time, and not, on condition of a fresh bill being taken in renewal. If a second bill were taken in renewal, it would not be a satisfaction of the first bill; it would be merely a suspension of the time of payment; *Kendrick v. Lomax*, 2 Cr. & J. 405,† S. C. 2 Tyr. 438. There could be no object in giving a renewed bill, if the time for payment of the bill were extended. The construction, that a second bill was to be given, would defeat the intention; for upon that construction, if no second bill were given, the first would be payable, and with damages

(a) November 27th, before Lord DENMAN, C. J., COLERIDGE, and WIGMAN, J. And on the 28th, before the same Judges and PATERSON, J.

for interest, which by the agreement is not to be payable. This construction would also put it in the defendant's power to determine whether the original acceptance should be nullified or not, since the initiative in the renewal of the bill would fall on him; *Gibbon v. Scott*, 2 Stark. N. P. Ca. 286 (E. C. L. R. vol. 3); and he might turn round on the holder and say, "this is no acceptance, for I will not apply to renew." The plaintiff's construction, on the other hand, sets up the acceptance as a good acceptance within the custom of merchants, gives a meaning to the contract, and secures the object of it, and renders the intervention of a second bill unnecessary. In this sense, the bill being payable at the enlarged time, the acceptance is rightly declared on.

Pashley, contra.—The acceptor of a bill of exchange may annex any condition he likes to his acceptance; and the holder may either adopt or reject such conditional acceptance. The acceptance in this case, "on condition of its being renewed," means that which the words would convey to any man of business, on *condition that the bill shall be renewed by the taking of another bill in substitution of [*896 the first on its maturity. The acceptance, therefore, is really no acceptance; for "the condition for a renewal entirely contradicts the instrument;" per Lord ELLENBOROUGH in *Hoare v. Graham*, 8 Camp. 57. [PATTESON, J.—According to that view of the subject, no action could possibly be brought on this acceptance: yet it must have been intended for a contract, and that there should be a remedy on it.] It is just as if the acceptance had been to pay by bills; here a special action would lie for not accepting the fresh bill. [PATTESON, J.—If the defendant refused to give the renewed bill, when would the present bill become due?] This bill would never be due in money; the defendant would be liable for his refusal to give the renewed bill. If a second bill were given, that would be a satisfaction and extinguishment of the former bill; *Kearslake v. Morgan*, 5 T. R. 518, *Sard v. Rhodes*, 1 M. & W. 153,† *S. C. Tyr. & G.* 298, *Sibree v. Tripp*, 15 M. & W. 23.† The very term "renewal" implies the extinguishment of the former bill. The modern authorities are against the doctrine of "suspension;" *Ford v. Beech*, 11 Q. B. 852 (E. C. L. R. vol. 63).^(a) The authorities also show that instruments clogged with conditions and qualifications are not bills or notes; *Hartley v. Wilkinson*, 4 Campb. 127, *Clarke v. Percival*, 2 B. & Ad. 660 (E. C. L. R. vol. 22), *Davies v. Wilkinson*, 10 A. & E. 98 (E. C. L. R. vol. 37).

Fortescue, in reply.—This is a good acceptance of a bill payable at the enlarged time. The Court will *reject words which militate [*897 against the obvious tenor and purpose of the instrument; Simp-

(a) In Exchequer Ch., reversing judgment of Q. B. in *Ford v. Beech*, 11 Q. B. 842 (E. C. L. R. vol. 63). See *Henderson v. Stobart*, 5 Exch. 99.†

son v. Vaughan, 2 Atk. 31, 32, Shuttleworth v. Stephens, 1 Campb. 407, Allan v. Mawson, 4 Campb. 115. *Cur. adv. vult.*

The Court afterwards directed a second argument, which was heard in this vacation, February 10th.(a)

Cowling, for the plaintiff, contended that the acceptance was absolute for payment in money; and that an undertaking for payment in any other mode would be contrary to the original design of bills of exchange, which was that they should, for the purposes of commerce, represent coin, and be at once exchangeable into it when occasion required; hence it was assumed in *Petit v. Benson*, Comberb. 452, that an acceptance, to pay half in bills, was, pro tanto, a refusal to accept. The defendant's construction, therefore, renders the acceptance void; and that which would make it operative should be preferred; *Roe dem. Wilkinson v. Tranmarr*, Willea, 682, 684, *Edis v. Bury*, 6 B. & C. 433 (E. C. L. R. vol. 13), *Gibson v. Minet*, 1 H. Bl. 569. A drawee may, consistently with custom, accept to pay at a different time from that specified in the bill; *Wegersloff v. Keene*, 1 Str. 214, 221, argument of Sir *J. Strange*; and that is the construction to be put upon the present acceptance. The consequence of such a deferred acceptance is considered in *Beawes*, *Lex Merc.* 594, s. 221 (6th ed., by Chitty). The words "being renewed" do not here imply the giving of a different bill.

*898] "Renew" is not invariably a technical term having that effect; and the provision here, "without interest," implies that the bill continues the same. A technical renewal was no more necessary here than an actual transfer in *Doe dem. Player v. Nicholls*, 1 B. & C. 336 (E. C. L. R. vol. 8). The acceptance makes the bill payable at the house of bankers, who would not give another bill, but would discharge this bill by payment of money placed with them to the account of the acceptor. If an actual renewal was meant, material stipulations are wanting: it is not provided that the drawer shall not endorse the bill away: nor does it appear by the acceptance who is to draw the new bill, or at what precise time it is to be payable.

Pashley, contra.—First. This is a good acceptance to pay by giving another bill of exchange in renewal. *Petit v. Benson* is the only authority against the validity of such an acceptance. "As an acceptance may vary from the tenor of the order, by introducing a condition, so it may vary from it as to the sum, time, place, or mode of payment;" *Smith's Mercantile Law*, p. 217, 4th ed. A payment by bill instead of money is only a variation as to the mode of payment. The "renewal" of the bill, however, would be an extinguishment of the claim upon it. "*Novatio est innovatio et transmutatio veteris debiti in aliam obligationem, per quam prior obligatio tollitur*;" *Brissonius de Verborum Significatione*, 918. But the declaration is insufficient; for it does not show performance of the condition, and entirely misdescribes the con-

(a) Before Lord DENMAN, C. J., PATTERSON, COLERIDGE, and WIGHTMAN, J.

tract. The word "accepted" is not to be taken by itself; if the *whole writing be read together, it will appear that it is no absolute engagement to pay in money or at the time alleged. The maxim "verba fortius accipiuntur contrà proferentem" does not apply to contracts. The condition cannot be rejected as repugnant; for it qualifies only, and does not destroy the acceptance; though by the law of France a conditional acceptance is void; Code de Commerce, art. 124. If, however, the meaning cannot be ascertained, this is no acceptance.

Cowling replied.

Cur. adv. vult.

PATTERSON, J., in this vacation (February 11th), delivered the judgment of the Court.

The first bill in this case is drawn by Thomas Thorpe on the defendant, and is dated 28th November, 1836, and requires the defendant, forty-two months after date, to pay to the order of Thorpe 500*l*. The defendant professes to accept it in these words: "Accepted on the condition of its being renewed until November 28th, 1844, without interest, payable by me at Messrs. Williams and Deacon's, Bankers, London." The plaintiff is endorsee of the drawer, and declares upon it as a bill *drawn* payable in 1840 (forty-two months after date), but *accepted* payable on the 28th November, 1844. The question is, whether the plaintiff is entitled so to construe the acceptance. The defendant contends that the true construction is, that he accepted the bill to be paid at the end of forty-two months by his then accepting another bill to be drawn on him payable on the 28th November, 1844. Now private written agreements must, so far as positive *rules of law will permit, be construed according to the apparent intention of the parties, to be collected from the instrument itself. In this case the obvious intention of the defendant on the face of the acceptance was, that he should not be called upon to pay in money until the 28th November, 1844. The bill as drawn called upon him to pay in money on the 28th May, 1840; but it was competent to him by his acceptance to extend the time of payment, subject to an option in the holder to take such acceptance and agree to such alteration, or to treat the bill as dishonoured by non-acceptance. The plaintiff, the endorsee, has taken such acceptance and agreed to such alteration, and has treated the acceptance as a mere extension of the time, not as throwing upon him or any one the necessity of procuring a new bill and acceptance at the end of forty-two months. Whether he was bound so to treat the acceptance, if he agreed to it at all, or not, is not the question; but whether he is at liberty so to treat it. Now, in so treating it, he manifestly fulfils the apparent intention of the defendant, to whom extension of time of payment was the object, and to whom it was wholly immaterial whether that extension was effected by such construction of the acceptance, or by taking a new acceptance

from him at the end of forty-two months. It does not therefore lie in the defendant's mouth to object to the construction put by the plaintiff on the acceptance, if the words of it are capable of such construction. Now they are capable of such construction, unless the word "renewed" necessarily imports that some new and additional bill or bills must be drawn and accepted. It is not a word of art; it has no legal or technical signification: and, though in *common parlance it *might* *901] appear, *primâ facie*, to apply to something new, yet there is nothing forced or absurd in giving it a different meaning; especially when we consider that, if this writing of the defendant on the bill be held necessarily and restrictively to mean that he will pay the bill at the end of forty-two months by then giving another acceptance payable on the 28th November, 1844, and is capable of no other meaning, it would appear by the authorities that it is no acceptance at all, since an acceptance must be to pay in money: and, as we cannot suppose, nor can the defendant be heard to say, that he meant it to be void and to be no acceptance at all, we feel that we shall be carrying into effect the real intention of the parties "*ut res magis valeat quam pereat*" by holding that the word "renewed" means "extended;" that the defendant meant nothing more than extension of time by the expressions he used: and then the plaintiff is at liberty, whether he was bound to do so or not, to treat the acceptance as he has done in his declaration, as an acceptance of the bill itself, making it payable at an extended time. Possibly an endorsee might have been at liberty to treat the acceptance, as between him and the acceptor, as a general acceptance to pay at the end of forty-two months, and to treat the condition as binding only on the drawer, and making it incumbent on him, the drawer, to provide for the bill at the end of forty-two months, and on the defendant then to give him another acceptance payable on the 28th November, 1844: but there are great difficulties in coming to the conclusion that the endorsee could have so done; and for the reasons above stated we think he was not bound so to do it.

*902] *The other bills are precisely similar, except as to the precise day of payment. Judgment for plaintiff.(a)

(a) Reported by H. Davison, Esq.

Application was made to have the case turned into a special verdict: but, on February 26th, in this vacation, PARRISON, J., said that the Court did not see reason to grant this, the point being too clear, and the question turning merely on a technical form.

The QUEEN, on the Prosecution of the LLANELLY Railway and Dock Company, v. The SOUTH WALES Railway Company.
Feb. 26.

The South Wales Railway Company, having power to take and purchase lands and to construct a railway according to the plans and books of reference deposited under their Act, gave notice to the Llanelly Railway and Dock Company that they (the South Wales Railway Company) required to purchase a small piece of land, on part of which the Llanelly Railway was actually constructed, such piece of land being set out, in the said plans and books of reference, as part of the proposed line of the South Wales Railway: but they afterwards refused to issue their warrant to the sheriff to assess the amount of purchase-money, on the ground that the Llanelly Railway and Dock Company had no power under their Act to sell any portion of land on which their railway was constructed.

Held, on mandamus to the South Wales Railway Company to issue their warrant, that, as there was no express clause in any special or general Act of parliament, which authorized either the Llanelly Railway and Dock Company to sell any part of their actual line of railway, or the South Wales Railway Company to purchase it, the authority was not to be implied from the general power given to the South Wales Railway Company to make their line, and to purchase lands, according to their deposited plans and books of reference.

MANDAMUS. The writ recited that by stat. 8 & 9 Vict. c. cxc. (Local and personal, public), intituled "An Act for making a railway to be called 'The South Wales Railway,'" certain persons were constituted a Company for making the said railway, branch railway, &c., with powers(a) to purchase and *hold lands for the purposes of the [908 undertaking, within the restrictions contained in the said act and in certain other acts, viz. the "Companies Clauses Consolidation Act, 1845," 8 & 9 Vict. c. 16, the "Lands Clauses Consolidation Act, 1845," 8 & 9 Vict. c. 18, and the "Railways Clauses Consolidation Act, 1845," 8 & 9 Vict. c. 20, the provisions of which recited acts were by the first-mentioned act incorporated therewith: that, before the passing of the act for making The South Wales Railway, plans and sections and books of reference of the railway and branch railway were deposited in the usual manner; and that it was enacted that the Company might, subject to the said act and the said recited acts, make the railway and branch according to the said plans, &c. The writ then recited that, under the powers of the Llanelly Railway & Dock Company's Acts, 9 G. 4, c. xci., 3 & 4 W. 4, c. lii., 5 & 6 W. 4, c. xcvi. (all local and personal, public), the last-mentioned Company had constructed a rail-

(a) Sect. 3. Sect. 23 was as follows. "And whereas plans and sections of the railway," &c., "by this act authorized, and showing the lines and levels thereof respectively, and also books of reference containing the names of the owners, lessees, and occupiers, or reputed owners," &c., "of the lands through which such works respectively are intended to pass, have been deposited with the clerks of the peace of the counties," &c.; "be it enacted, That, subject to the provisions in this and the said recited acts" (8 & 9 Vict. cc. 16, 18, 20), "contained, it shall be lawful for the said Company to make and maintain the said railway and branch railway in the line and upon the lands delineated on the said plans, and described in the said books of reference, and to enter upon, take, and use such of the said lands as shall be necessary for such purpose."

Sect. 33 empowered the Company, if they should think fit, to carry the railway and branch railway across and on the level of certain roads numbered on the plans and named in this clause.

way, dock, and other works, and had purchased and still held certain lands, and, among others, the pieces of land in the writ particularly described: that the said last-mentioned pieces of land were duly inserted *904] in the said book of reference of The South Wales Railway Company, as lands through which the works of the said Company were intended to pass; that The South Wales Railway Company, on the 12th March, 1847, gave notice that they required to take and purchase of The Llanelly Railway & Dock Company part of the said pieces of land, containing between one and two acres, being land which The South Wales Railway Company were authorized to purchase and take: that the two Companies had failed to agree upon the amount of purchase-money; that the amount claimed exceeded 50l.: and that The South Wales Railway Company, on the 12th of February, 1848, were duly required to issue their warrant to the sheriff of the county in which the said pieces of land were situate, requiring him to summon a jury, under the said "Lands Clauses Consolidation Act, 1845," (a) to assess the amount of purchase-money; which the said Company had refused to do. The writ then commanded the Company to issue their warrant for the purpose aforesaid.

Return. That a portion of the said pieces of land formed part of the actual line of the railway constructed by The Llanelly Railway & Dock Company under the powers of their said acts of parliament, and was, at the issuing of the writ, and still is, used as part of the said railway, which is a public railway. That neither The Llanelly Railway & Dock Company, nor any persons on their behalf, were authorized to sell, convey, release, or dispose of the whole or any part of the said portion of the said pieces of land, which so forms part of the actual line of the said railway, and whereon it was so actually constructed; *905] but that the defendants were willing to issue their warrant to assess the purchase-money, &c., to be paid for the said pieces of land in the writ mentioned, exclusive of the said portion on which the said railway was so actually constructed.

Demurrer and joinder.

The demurrer was argued in Hilary vacation, 1849.(b)

Greenwood, for the Crown.—There is nothing in any of the acts recited in the writ to prevent the defendants from purchasing and taking the land in question. It is no answer, that the new railway could not be made on this land without crossing The Llanelly Railway at a level. [COLERIDGE, J.—Can the prosecutors convey? If railway acts contained no provision enabling infants to convey, they would be incompetent to do so.] It stands on the record that the prosecutors are the owners of the land; they may, therefore, convey it away, unless

(a) See stat. 8 & 9 Vict. c. 18, sects. 22, 23.

(b) February 9th. Before Lord DENMAN, C. J., PATTERSON, COLERIDGE, and WIGHTMAN, Jts. COLERIDGE, J., was not present during the argument for the defendants.

especially incapacitated. Again, the power to make the railway on the lands in the book of reference, and to take and purchase such lands, involves the correlative power in the owners of such lands to sell them; and also involves the power to cross the existing railway at a level. There is nothing in the general acts to prevent one railway from crossing another at a level. In the very act of The South Wales Railway Company, power is given, by sect. 45,(a) to a private person to carry his *railway across The South Wales Railway at a level. By [*906 stat. 9 & 10 Vict. c. cxxxix.(b) (local and personal, public), it is recited in sect. 14 that the railway authorized by that act "is intended to cross The Severn and Wye Railway upon a level, near to the port of Lydney;" and it is enacted, in relation to such power of crossing, that The South Wales Railway Company are to do certain works there for the purpose of effecting a communication and facilitating traffic between the two railways. The rights of the public over the Llanelly Railway will not be prejudiced by the purchase; for the purchaser will take subject to such rights, just as the purchaser of land over which there is a public right of way takes the land subject to such right. In *Rex v. Pease*, 4 B. & Ad. 30 (E. C. L. R. vol. 24), where the owner of a railway was indicted for a nuisance, it appeared that the railway in some places came within five yards of an ancient highway, so that the locomotive engines on the railway frightened the horses passing on the highway. It was held that, as the railway was made on the line authorized by the Legislature, this interference with the rights of the public must be taken to have been authorized in like manner.

Watson, contrâ.—The object of the prosecution is, by compelling the defendants to purchase the small portion of land in question, by which the whole of The Llanelly Railway will be obstructed and rendered useless, to lay the foundation of a claim against the defendants for about 200,000*l.* as compensation in respect of the entire value of The Llanelly Railway. The prosecutors, having *made a [*907 public railway, are bound to maintain it; *Rex v. The Severn and Wye Railway Company*, 2 B. & Ald. 646; how can they do so, if it be crossed by another railway at a level? Section 33 of The South Wales Railway Company's Act gives power to cross certain roads on a level, but does not specify The Llanelly Railway among them. He then referred to ss. 46, 49, and 53 of stat. 8 & 9 Vict. c. 20, the "Railways Clauses Consolidation Act, 1845," as contemplating that, under circumstances like the present, the new railway should be carried either under or over the old railway; in which case the purchase would

(a) Which provides that nothing in this act shall prevent Nathaniel Cameron, Esq., the owner of certain collieries in the county of Glamorgan, from making any branch railway therefrom to the Company's railway, or along the side thereof, or from carrying such branch railway across the Company's railway on the level thereof.

(b) "For extending the line of the South Wales Railway, and for making certain alterations of the said railway," &c.

be unnecessary. [PATTESON, J.—The record does not appear to show that the two lines of railway are to be on a level.]

Greenwood replied.

Cur. adv. vult.

PATTESON, J., now delivered judgment.

The sole question raised in this case is, whether The South Wales Railway Company, having power to cross The Llanelly Railway and Dock Company's line, are bound to purchase the soil on which the latter railway is actually constructed at the point of crossing, or only the land on each side of that railway.

Much discussion took place as to the right of The South Wales Railway Company to cross the other line on a level. We do not find any authority so to do, either in the Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, or the Lands Clauses Consolidation Act, 1845, *908] 8 & 9 Vict. c. 18, or in any other Public *General Act, or in the special Acts relating to either of these railways. But, if any such right existed, we cannot find any clause which authorizes The Llanelly Railway Company to sell, or The South Wales Railway to purchase, any part of the actual line of The Llanelly Railway.

The writ of mandamus states that the closes there described are mentioned in the books of reference and plans referred to in The South Wales Railway Company's Acts, 8 & 9 Vict. c. cxc., and 9 & 10 Vict. c. ccxxxix.; that The South Wales Railway Company had given notice to purchase *parts* of those closes, and, the parties disagreeing as to the price, had refused to summon a jury; and calls on them so to do. The return states that parts of those closes constitute the actual line of The Llanelly Railway; that they have been always ready to summon a jury to assess the price of the residue of the closes, and the damages which would be sustained by The Llanelly Railway Company, by The South Wales Railway Company crossing their line at such parts of the closes as constitute their actual line, but that they cannot summon a jury to assess the price of those parts, since neither the one party can by law sell, nor the other purchase, such parts.

We think that they are right in their construction of the law, and that they have shown, by their return, that they have been, and are, ready to do all that by law they can be required to do. Judgment must therefore be given for the defendants.

Judgment for defendants.(a)

(a) Reported by H. Davison, Esq.

*This case was unavoidably omitted in the earlier part of the present volume. See p. 528, *antè*. [*909]

VIGERS *v.* The Dean and Chapter of ST. PAUL'S, and Others.
[*Jan.* 15, 1849.]

Henry VIII., being seised of lands in fee in right of his Crown, granted them, by letters patent, in tail male to W., reserving rent to himself, his heirs and successors. After the passing of stats. 22 C. 2, c. 6, and 22 & 23 C. 2, c. 24, Charles II., by letters patent referring to and professing to pursue the former statute, granted the rent to trustees named in sect. 2 of stat. 22 & 23 C. 2, c. 24, their heirs and assigns; and the trustees granted the rent to a Dean and chapter, and their successors for ever. Held in Q. B., and by the Court of Exchequer Chamber on error, that the grant to the trustees was not authorized by either statute, the rent being reserved upon an estate whereof the reversion was in the Crown, and therefore being within the exception in sect. 3 of stat. 22 C. 2, c. 6.

Held in Q. B., and *Semble* by Exch. Ch. on error, that on demurrer to an avowry for a distress on the land by the Dean and chapter, stating the conveyances as above, but not setting out the recitals or the terms of the grants, it was to be taken that the truth appeared on the face of the grant of the rent to the trustees, and therefore that the Crown did not appear to be deceived (as not having the power to grant the rent in fee simple), nor was the grant void on that account; but that it operated, not as a grant in fee simple, but of a rent determinable on the failure of the estate tail: and, further, that there was thus no ground for the objection, that a subject might have a right to distrain on the Crown when the reversion fell in: although the avowry alleged that the trustees became seised in fee of the rent. Also that the grant in effect, by severing the rent from the reversion, converted it from a rent service to a rent sock; which, if paid for three years of the space mentioned in stat. 4 G. 2, c. 28, s. 5, might be distrained for.

Held by Q. B., and *Semble* by Exch. Ch. on error, that the grant of such rent seek by the trustees to a Dean and chapter was not void by the Statutes of mortmain, the rent not being perpetual.

Held, by Q. B., that it was sufficient to aver in the avowry, that the rent reserved became due and in arrear, without an express averment of the continuance of the estate tail. *Semble* contra, by Exch. Ch. on error.

Held, by Exch. Ch. on error, that the avowry was bad on general demurrer for not expressly averring attornment by the terre-tenant to the grant by the trustees, or that such grant was made after stat. 4 Ann. c. 16; and the defect was not supplied by an averment that the rent had been paid, not saying to whom, and not saying that the payment was in the life of the grantor: nor by an averment, following the statement of the grant by the trustees, "whereupon and whereby" the grantees became and were seised of the rent, and an averment that the rent was due and in arrear to them.

REPLEVIN by Francis William Vigers against the Bishop of Llandaff, Dean of the Cathedral Church of St. Paul, London, and the Chapter of the same church, Henry John Knapp, Subdean of the said church, and John Tomkies. The declaration charged that defendants, to wit, on 8d April, 1846, in the parish of St. Mary le Bow, in the city of London, in the ward *of Cheap, in a certain carpenter's shop there situate, took the goods and chattels, to wit, 100 deal boards, &c., [*910 of plaintiff, of great value, to wit, 150*l.*, and unjustly detained, &c.

Avowry by the Dean and Chapter, and cognisance by Knapp and Tomkies, as bailiffs of the Dean and Chapter. That Henry 8th, deceased, formerly King of England, heretofore, and before and at the time of the granting of the letters patent hereinafter next mentioned, to wit, 22d July, 1539, was seised in his demesne as of fee, in right of his Crown of England, of and in the said shop in which, &c.; and,

being so seised, the said King Henry 8th afterwards, to wit, on the day and year aforesaid, in the 31st year of his reign, by his letters patent, bearing date at Berechurch, the day and year aforesaid, sealed with his Great Seal of England, and in due manner enrolled of record in the Court of Chancery of the said late King, in consideration of the true, good, and faithful services which Edmund Walsyngham, Knight, previous to the time of making the said letters patent, had rendered to the said King, did give and grant to the said Edmund, amongst other things, the said shop in which, &c., with the appurtenances, to have, hold, and enjoy the same, with the appurtenances, in London aforesaid, to the aforesaid Edmund Walsyngham, and the heirs male of the body of the said Edmund lawfully begotten, to be held of the said King, his heirs and successors, by the service of the twentieth part of one knight's fee, and paying therefore annually to the said King, his heirs and successors, 4*l.* 11*s.* 4*d.*, at the said King's Court of Augmentations of the revenues of his said Crown, at the Feast of Saint Michael the Archangel, every year, *911] to *be paid for all rents, services, and demands whatsoever, in any manner to be rendered, made, or due; as by the record of the said enrolment, now remaining in the High Court of Chancery at Westminster, more fully appears. Whereupon and whereby the said Edmund Walsyngham then became and was seised in his demesne, as of fee tail male, of and in the said shop in which, &c.; and the said King then became and was, and from thence until and at the time of his death continued to be and was, seised as of fee, in right of his Crown of England, of and in the reversion expectant on the determination of the said estate tail, and of and in the said service, and of and in the said rent of 4*l.* 11*s.* 4*d.* That, the said King being so seised of the said reversion, service, and rent of 4*l.* 11*s.* 4*d.*, in right of his said crown of England, the said King afterwards, to wit, on 28th January, 1547, died so seised of the said reversion, service, and rent of 4*l.* 11*s.* 4*d.* Whereupon and whereby the said reversion, service, and rent of 4*l.* 11*s.* 4*d.*, then descended and came to the Lord Edward 6th, formerly King of England, in right of his Crown of England; and thereby the said Edward then became and was, and from thence until and at the time of his death continued to be, seised as of fee, in right of his said Crown of England, of and in the said reversion, service, and rent of 4*l.* 11*s.* 4*d.* The reversion, service, and rent were then traced, in the same form, to the successive Sovereigns; namely: Queen Mary, 6th July, 1558: Queen Elizabeth, 17th November, 1558: James 1st, 24th March, 1603: Charles 1st, 27th March, 1625: Charles 2d, 30th January, 1649. Whereupon and whereby the said reversion, service, and rent then *912] *descended and came to Charles 2d, formerly King of England, in right of his Crown of England; whereupon and whereby the said Charles 2d then became and was, and from thence until and at the time of the making of the letters patent hereinafter next mentioned

continued to be, seised as of fee of and in the said reversion, service, and rent. And the said Charles 2d, being so seised, afterwards, to wit, on 11th November, 22 C. 2, by his letters patent then made, bearing date at Westminster, the day and year last aforesaid, sealed with his Great Seal of England, and in due manner enrolled of record in the Court of Chancery of the said King Charles 2d at Westminster, after referring, in the last-mentioned letters patent, to the Act of parliament next hereafter mentioned, did, for the constituting and appointing of trustees for the sale of certain fee farm rents and other rents in the same last-mentioned letters patent mentioned, and, amongst them, of the said rent of 4*l.* 11*s.* 4*d.*, give and grant unto Francis Lord Hawley, Sir Charles Harbord, Knight, Sir William Haward, Knight, Sir John Talbot, Knight, Sir Robert Stewart, Knight, and William Harbord, Esquire, mentioned in the last-mentioned Act,(a) and their heirs, amongst other things, the said annual rent of 4*l.* 11*s.* 4*d.* so reserved, &c., to have and to hold the said rent of 4*l.* 11*s.* 4*d.* unto the said Francis Lord Hawley, &c., and their heirs, to the only use and behoof of them, the said Francis Lord Hawley, &c., and of their heirs and assigns for ever: nevertheless, upon trust, and to the intents and purposes, in the said last-mentioned letters patent mentioned, expressed and declared; that is to say: *upon trust, and to the intent, [*913 that they, the said F. Lord Hawley, &c., and their heirs, should stand seised of the said rent of 4*l.* 11*s.* 4*d.* until sale thereof made, and some conveyance thereof executed, in trust to and for the benefit of the said King Charles 2d, his heirs and successors, as by the said letters patent, &c. (profert of exemplification of enrolment). Whereupon and whereby the said F. Lord Hawley, &c., then became and were, and from thence until and at the time of the making of the indenture next hereinafter mentioned continued to be, seised as of fee of and in the said rent of 4*l.* 11*s.* 4*d.* Allegation, that the last-mentioned letters patent were so made, as aforesaid, after the making and passing of an Act (22 C. 2, c. 6, “for advancing the sale of fee-farm rents, and other rents”), and before 24th June, 1672, to wit, on the said 11th November, 22 C. 2. And, the said F. Lord Hawley, &c., being so seised as aforesaid, afterwards, and in the lifetime of one William Sancroft, since deceased, and while the said W. Sancroft was Dean of the said Cathedral Church of St. Paul’s, London, and before any part of the rent hereinafter mentioned to have been in arrear accrued or became due or payable, to wit, on 10th September, 23 C. 2, by a certain indenture then made, between the said F. Lord Hawley, Sir C. Harbord, Sir W. Haward, Sir J. Talbot, Sir R. Stewart, and W. Harbord, of the one part, and the said W. Sancroft, Dean, &c., and the Chapter of the same Church, of the other part (excuse of profert, the deed having been lost by accident), the said F. Lord Hawley, &c., for a certain consideration

(a) 22 & 23 C. 2, c. 24, ss. 1, 2.

in money recited in the last-mentioned indenture, that is to say, in consideration of the sum of 937*l.* 4*s.* 2*d.*, part of the several *sums *914] of 1337*l.* 17*s.* 4*d.* and 600*l.* 10*s.* 10*d.* in the said last-mentioned indenture mentioned, then paid by the last-mentioned Dean and Chapter to the said F. Lord Hawley, &c., as recited and expressed in the last-mentioned indenture, and of and from which last-mentioned sum of money, &c. (acquittal, &c., of the Dean and Chapter and their successors, &c., by the indenture), did grant the said rent of 4*l.* 11*s.* 4*d.* to the last-mentioned Dean and Chapter and their successors for ever; as by the said indenture, reference, &c.: whereupon and whereby the last-mentioned Dean and Chapter then became and were, and they and their successors for the time being, and from thence until and on and during the day on which the feast of Saint Michael the Archangel would have fallen in A. D. 1845, if the Act, &c. (24 G. 2, c. 23, "for regulating the commencement of the year; and for correcting the calendar now in use") had not been passed, that is to say, until and on and during 11th October, A. D. 1845, and from thence until and at the said time when, &c., continued to be and were seised as of fee of and in the said rent of 4*l.* 11*s.* 4*d.* That the said feast of Saint Michael the Archangel, at which in every year the rent was so as aforesaid made payable by the first-mentioned letters patent, was the feast of Saint Michael the Archangel according to the calendar in use in England before and at the time of the passing of the last-mentioned Act. That the said rent of 4*l.* 11*s.* 4*d.* was duly paid for the three years within the space of twenty years(a) next before the first day of the Session of Parliament *915] holden in the 4th year of the reign of King George 2d, to *wit, for the space of the three years, A. D. 1720, 1721, 1722. And, because 27*l.* 8*s.* of the rent aforesaid, for six years ending on 11th October, 1845, and also at the said time when, &c., was due and in arrear to the Dean and Chapter for the time being, &c.: avowry and cognisance of taking the goods as a distress for the rent so due, and which still remains due, &c. Verification.

Demurrer, assigning as grounds (in effect): That it did not appear that the estate granted to E. Walsyngham continued when the rent distrained for accrued: That the rent was reserved to the King, his heirs and successors, and not to his assigns, and could not be assigned when severed from the reversion: That it did not appear that plaintiff, or those under whom he held, claimed through E. Walsyngham: That the shop, being in the City of London, was land of socage tenure, and could not be granted to be held by knight's service: That, as Charles II. was not seised as of fee in the rent, he could not grant it in fee, and consequently in such grant was deceived, and the same was void: That, for the same reason, the grant of the rent to the Dean and Chapter in fee simple was also void: That the creation of a rent-charge

(a) See stat. 4 G. 2, c. 23, s. 5.

in fee simple was not to be presumed against the Crown from the terms of the grant of Charles II. ; and, if the estate therein, claimed by the Dean and Chapter, were not a fee simple, the avowry and cognisance was bad for uncertainty, in not distinctly showing the estate: That, if it was a base fee, it was not properly described: That the rent was stated to be reserved and issuing out of the shop, whereas the legal effect of the grant was that the rent was reserved and issuing out of the estate granted by Henry VIII. in the shop: That when reserved by *Henry VIII., it was a rent service, and consequently, when severed from the reversion, could not without express words (if [*916 at all) be made a rent-charge, and was not a rent-charge, nor stated to be so: That, being part of the reversion in law, it was not a rent seck: That, not being rent-charge or rent seck, it was not within stat. 4 G. 2, c. 28, and could not be distrained for: That the reversion of the estate granted by Henry VIII. appearing to be in the Crown, the right claimed was to distrain on land which was or might be in the possession of the Crown: That it did not appear that the six years for which the rent was claimed were six years preceding the day of the distress; and that the rent was claimed for six years ending in A. D. 1722, or the first day of the session of parliament in 4 G. 2.

Joinder in demurrer.

The demurrer was argued in Michaelmas vacation, (a) 1847, by *Ogle* for the plaintiff in replevin and *Watson* for the defendants. The course of argument will sufficiently appear from the judgment, and from the argument and judgment in the Court of Error. *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the Court.

The pleadings in this case show that King Henry the 8th, being seised in fee of the shop distrained on, granted it by letters patent to Sir Edmund Walsyngham in tail male, at an annual rent of 4l. 11s. 4d. The reversion is then traced to King Charles the 2d, who, *by [*917 letters patent, professing to act under stat. 22 C. 2, c. 6, conveyed the rent, without the reversion in the shop, to trustees, who conveyed it to the Dean and Chapter of St. Paul's. The avowry shows that the rent was paid for three years before the passing of stat. 4 G. 2, c. 28, respecting rent seck, and justifies distraining for arrears.

On demurrer, it is objected that this rent was reserved upon an estate whereof the reversion was in the Crown at the time of the passing stat. 22 C. 2, c. 6, and that the rent was incident to the reversion; therefore that, by sect. 3 of the act, it is expressly excepted from its operation, and is also excepted from stat. 22 & 23 C. 2, c. 24, passed to supply some deficiencies in letters patent granted under the former act. We are of opinion that this objection is valid, and that the grant cannot be supported under those statutes.

But it is argued that the grant by the Crown to the trustees was

(a) December 8th, before Lord DENMAN, C. J., PATTERSON, COLERIDGE, and WIGHTMAN, J.

good independently of the statutes of Charles 2, and that the effect of it was to convert the rent, which was before a rent service, into a rent seck,^(a) which is the ordinary effect of separating the rent from the reversion to which it is incident. Then, as it is averred that the rent was paid for three years before the passing of stat. 4 G. 2, c. 28, that statute applies; and the Dean and Chapter might well distrain for the rent as a rent seck, if it was legally conveyed to them by the trustees. On the other hand, it is argued that King Charles 2d, not being seised of the rent in fee, but only during the continuance of the *estate tail created by King Henry the 8th, with the reversion *918] in fee in the shop, could not grant the rent in fee to the trustees, though he might sever it from the reversion in the shop, and grant it to them and their heirs during the continuance of the estate tail; and so, that the Crown was deceived, and the whole grant was void. Now we must take it, upon these pleadings, that the truth appeared upon the face of the grant, which is of the rent *so reserved as aforesaid*, namely, during the continuance of the estate tail. Upon failure of the estate tail, the rent would cease; and therefore the Crown cannot be taken to have granted an absolute fee in the rent, which rent was not perpetual and might at any time cease; but only to have granted what it had. And this is an answer to another objection that, if the grant be taken to be of the rent in fee, it might operate as a rent-charge on the failure of the estate tail, when the reversion would fall into the hands of the Crown; and so a subject might have a right given him to distrain on the Crown.^(b) No such illegality would follow; for, as has been already stated, the rent would cease on failure of the estate tail, and cannot be considered as a rent-charge at all. It is true that the avowry states the trustees, and afterwards the Dean and Chapter, to be seised *as of fee* in the rent; but that averment must be taken with the same qualification, inasmuch as the continuance of the rent during the estate tail only appears on the face of the avowry.

A further objection is made, that there is no averment that the estate *919] tail continues. The better opinion appears *to be that it is not necessary to aver the continuance of the estate tail, even where a party claims under the tenant in tail, note (8) to Thursby v. Plant, 1 Wms. Saund. 235 b (6th edit.). Much less can it be necessary in such a case as this, where it is averred that the rent reserved on the grant in tail became due and in arrear; which could not be if the estate tail were not continuing.

The next objection is, that the conveyance from the trustees to the Dean and Chapter was void by the Statutes of Mortmain. Sect. 10 of stat. 22 C. 2, c. 6, does indeed authorize corporations to purchase

(a) Gilbert on Distresses, 4, 5 (4th ed., by Impey), was cited in the argument.

(b) On this point, reference was made, in the argument, to Chitty on the Prerogatives of the Crown, 376, where Jenkyns, cent. iii., ca. 18, and Willion v. Berkley, Plowd. 223, 242, are cited

the rents alluded to in that statute, notwithstanding the Statutes of Mortmain: but we have already expressed our opinion that the grant in question is not good under that statute. Again, the conveyances cannot operate as a license from the Crown to hold in mortmain, as perhaps they might if the Crown had been party to the conveyance to the Dean and Chapter: but it is not so. If, therefore, the rent had been a rent in fee, it would be difficult to say that the Statutes of Mortmain would not apply; but it is not a rent in fee; and we have not been able to find any authority for the proposition that the Statutes of Mortmain forbid a corporation to hold that which is not in itself perpetual.

Upon the whole, we are of opinion that the Dean and Chapter of St. Paul's are well entitled to the rent in question, as a rent seck, during the continuance of the estate tail granted by the letters patent of King Henry the 8th, and are entitled to distrain for the arrears under stat. 4 G. 2, c. 28: and our judgment must be for the defendants.

Judgment for defendants.

*IN THE EXCHEQUER CHAMBER. [*920

(Error from the Queen's Bench.)

VIGERS v. The Dean and Chapter of ST. PAUL'S, and Others.
[Nov. 27, 1849.]

For marginal note, see p. 909, ante.

ERROR having been brought in the Exchequer Chamber on the above judgment, the case was argued in Trinity vacation, 1849,(a) before COLTMAN, MAULE, CRESSWELL, and WILLIAMS, Js.,(a) and PARKE, ALDERSON, and PLATT, Bs.

Ogle, for the plaintiff in error.—The avowry is bad. First. The rent in question was reserved upon an estate whereof the reversion was in the Crown; the rent, therefore, is by sect. 8 of stat. 22 C. 2, c. 6, excepted from the powers of sale given by that act. Secondly. The avowry does not allege that the indenture by which the trustees conveyed to the Dean and Chapter was enrolled. This is required by sect. 6; and by sect. 7 the purchaser of such rent is not adjudged to have the actual seisin until after the enrolment of his conveyance. It may be said that, even if the statute has not been complied with, the conveyance to the Dean and Chapter is good as a bargain and sale at

(a) June 14th and 15th. WILLIAMS, J., was not present on the former day.

common law. But it is clear that the intention was to convey under the statute; and "in the case of a Crown grant it shall *not
 *921] enure to any other intent than that specified in the grant;" Chitty's Prerogatives of the Crown, 393. Thirdly. The title of the Dean and Chapter is defective, because the rent is conveyed to the trustees in fee, whereas the Crown had no title to the rent except during the continuance of the estate tail: the Crown, therefore, was deceived in its grant to the trustees, so that the grant is void, and the trustees themselves had no title to convey. Fourthly. The grant to the Corporation is void within the Statute of Mortmain: "The taking a lease for a very long term, as 100 or 200 years, is within the Mortmain Act;" Shelford on the Law of Mortmain, p. 9, citing *Hemming v. Brabason*. (a) Fifthly. The reversion in the shop being in the Crown, the avowry claims the right to distrain on premises which may be in the possession of the Crown. Sixthly. The conveyance to the trustees, not being within stats. 22 C. 2, c. 6, and 22 & 23 C. 2, c. 24, is void, because a subject cannot be trustee for the Crown at common law. Seventhly. There is no allegation of attornment to the Dean and Chapter; and stat. 4 Ann. c. 16, s. 9, will not avail, as it applies only to grants made after the statute. It is indeed averred that rent has been paid, but not that it has been paid to the Dean and Chapter.

Watson, contrâ.—The avowry shows a valid grant under stat. 22 C. 2, c. 6. The third section is in continuation of the enabling and not of the excepting part of the second section. [MAULE, J.—The enabling
 *922] part of the second section had already mentioned "divers *other rents of what nature or kind soever they be;" so that the third section, if taken in an enabling sense, would add nothing. PARKE, B.—How do you get over the objection as to the non-enrolment of the grant to the Dean and Chapter? The directions as to enrolment constitute, at most, a condition subsequent; the grant operated immediately; the enrolment is to be made within six months; and the defect, being matter subsequent, should have been pleaded in answer.

Stat. 22 & 23 C. 2, c. 24, by section 8, gives a general form of avowry, that the trustees were seised in fee, "and so seised granted the same." The grant to the Dean and Chapter was, at all events, good at common law. The Crown had power to alien: the Crown did convey to the trustees; and they conveyed to the Dean and Chapter. No question of attornment, even if the objection can be taken on general demurrer, and, it is contended, it cannot be so taken, arises on these pleadings. On conveyance by the Crown, the rent became rent seck; and afterwards stat. 4 G. 2, c. 28, s. 5, annexed the remedies incident to rent service to rent seck, if paid for three years within twenty years before the first day of the Session. Where a reversion was assigned, there was no right of distress until attornment; but, where rent only

(a) Reports of Judgments of Sir O. Bridgman, pp. 1, 7.

was assigned, that, although merely rent seck, passed by the grant and required no attornment to perfect the transfer; Co. Lit. 151 b. [PARKE, B., referred to Littleton, sect. 551. The objection would be cured by verdict; note (1) to Stennel v. Hogg, 1 Wms. Saund. 228; here [*923 we are on demurrer; that is the difficulty.] There *is a distinct averment that the Dean and Chapter were seised; this implies attornment. If that be not so, still, on general demurrer, it is sufficient to allege that the rent passed by the grant; for, as the rent would pass without attornment since stat. 4 Ann. c. 16 (s. 9), it must be taken that the grant was since that statute. "That which is apparent to the Court by necessary collection out of the record need not be averred;" Co. Lit. 808 b. Again, it is alleged that the rent "was duly paid for the three years;" that must mean that it was paid by the occupier to the person entitled to receive it; for, if paid either by a stranger or to a stranger, it would not be duly paid. [PLATT, B.—That allegation may apply to a payment of rent to the trustees or to their heir. CRESSWELL, J.—The avowry shows an estate in the trustees, and does not show a determination of it. PARKE, B.—It ought to appear affirmatively that the rent was paid during the lives of the grantor and grantee. As a corporation lives for ever, it would probably be enough to allege the payment during the life of the grantor.] "Duly paid" must mean duly according to the title alleged in the plea. [CRESSWELL, J.—That is, the rent was duly paid to the Dean and Chapter because there was an attornment to them, and there was an attornment to them because the rent was duly paid to them.] No attornment was necessary in the case of a grant either by or to the Crown. As to the objection on the Mortmain Act, the object of that Act was to prevent land vesting in religious bodies in perpetuity. [PARKE, B.—There may also be this answer, that the grant would be good as between grantor and grantee, and the rent be in the corporation until office found.] Lastly, as to the objection, taken in the *Court below, but which has not been [*924 noticed in the present argument, that the avowry contains no averment of the continuance of the estate tail. The authorities on this point are collected in note (8) to Thursby v. Plant, 1 Wms. Saund. 235 b (6th ed.): where the learned editor remarks: "But the better opinion seems to be, that it is not necessary to aver the life of tenant in tail, or the continuance of the estate tail." The avowry alleges that the Dean and Chapter were seised down to the time of the distress, and that the rent was in arrear. Fryer v. Coombs, 11 A. & E. 403 (E. C. L. R. vol. 39), is not in point; for there the question was as to the necessity of averring the continuance of an estate for life. [PARKE, B.—The case shows that, if the averment be necessary, it is not supplied by an averment that the rent was in arrear to the party claiming it.]

Ogle, in reply.—[MAULE, J.—We agree with the Court below, that

the case is within the third section of stat. 22 C. 2, c. 6, and that this section is exceptive; the only question, therefore, is, whether the title is shown at common law.] It is unnecessary to consider whether attornment was requisite where the grant was either by or to the Crown; for the objection is to the want of attornment on a grant by subjects to the Dean and Chapter. The plaintiff in error has as much right to say that the averment "duly paid" means payment to the grantor as the defendant has to say that it means payment to the grantee. The attornment must be during the life of the grantor; Lit. sect. 551; on the *925 necessity of attornment sections 225, 552, 553, 554, also may be referred to. After the rent was severed from the reversion it became rent seek; and it is for the avowants to show that a right to distrain has been subsequently acquired. The averment, "whereupon and whereby" the Dean and Chapter became seised, is insufficient; for it is alleged immediately after the recital of the conveyance to them, and as the effect of that conveyance merely. With respect to the continuance of the estate tail, the avowry leaves this in doubt, and "ambiguum placitum interpretari debet contra proferentem." And no presumption of this can be made, as it would be a presumption against the Crown.

Cur. adv. vult.

PARKE, B., now delivered the judgment of the Court.

This case was argued at the sittings after last Term before my brothers ALDERSON, MAULE, CRESSWELL, PLATT, and myself, and our late most estimable and lamented colleague, Mr. Justice COLTMAN. My brother WILLIAMS also heard a part of the argument. The surviving Judges who heard the whole of it are of opinion that the judgment of the Court of Queen's Bench is erroneous. From that opinion my brother WILLIAMS, so far as he heard the argument, does not dissent; nor have we any reason to believe that our late brother COLTMAN did.

The question arose upon the sufficiency of an avowry and cognisance, to which there was a special demurrer. The avowry and cognisance states that King Henry the 8th was seised in his demesne as of fee in the shop in which, &c., and, by his letters patent enrolled, granted it to Edmund Walsyngham, Knight, and the heirs male of his body, paying therefore annually to the King and his heirs and successors 4*l.* 11*s.* 4*d.* *926] at the King's Court of Augmentation, &c., at the Feast of Saint Michael. It then deduces the title of the rent to King Charles the 2d, and then states that he by his letters patent enrolled of record, after referring therein to the statute 22 Car. 2, c. 6, granted the said rent to certain trustees mentioned in the act, and their heirs, upon trust, till sale, for King Charles the 2d: and then a profert is made of an exemplification of the letters patent by the defendants; but it is not set out at length. The trustees are then averred to have conveyed by indenture (not stated to have been enrolled), for certain pecuniary considerations therein expressed, the said rent to the defendants, the

Dean and Chapter of St. Paul's, "whereupon and whereby" "they became and were" "seised as of fee of and in the said rent;" and they and their successors continued to be so seised till and at Michaelmas, 1845, and from thence until and at the said time when, &c. It is then averred that the said rent was duly paid for the three years within twenty years next before the passing of stat. 4 Geo. 2, c. 28; and the avowry and cognisance is then made for 27*l.* 8*s.* of the rent aforesaid, which is alleged to be due and in arrear to the Dean and Chapter at the said time when, &c. To this there was a special demurrer, assigning various causes, to which it is not necessary to refer.

In the argument in the Court of Queen's Bench, the objections taken were: First. That this case was not within the statute 22 C. 2, c. 6, because the reversion was in the Crown, and therefore, by sect. 3, the statute did not apply. Secondly. That, if it was within the statute, the provisions of it were not complied with, because the conveyance by the trustees was *not by bargain and sale enrolled: and, further, that the Statute of Mortmain avoided the grant. Thirdly. That the conveyance to the trustees was void, because the King was deceived in his grant.^(a) Fourthly. That there is no averment expressed or implied of the continuance of the estate tail of Edmund Walsyngham.

The Court of Queen's Bench decided against the validity of these objections; and we think the Court was perfectly right in holding that the case was not within the statute 22 C. 2, c. 6, as the reversion was in the Crown, and consequently that the avowry and cognisance could not be supported under that statute. We also agree that there is no objection to the title of the Dean and Chapter, under the grant at common law, on the ground that the conveyance to the trustees was void because the Crown was deceived in its grant inasmuch as, having a title only to the rent service during the continuance of the estate tail, it granted a rent in fee. We cannot assume upon these pleadings, which do not set out the recitals in the letters patent, or the precise terms of the grant itself, that the Crown was deceived. Nor are we disposed to think the other objection is of any weight, that the deed of conveyance to the corporation was void under the Statute of Mortmain. If the Statute of Mortmain did apply to the estate tail in a rent, the estate would probably pass, but be forfeited; if it were land, it certainly would be void only on the entry of the lord.

The other objection insisted upon in the Court of Queen's Bench was that there was no averment as to *the continuance of the estate tail. The Court intimated that the better opinion was, that no such averment was necessary, and that the allegation that the rent was due and in arrear, which could not be if the estate tail was not conti-

(a) On this point, reference was made, in the argument below, to Com. Dig. *Grant* (G. 8). See *Gledstanes v. The Earl of Sandwich*, 4 Man. & G. 995 (E. C. L. R. vol. 43), 1 Stephen Com. 588, 9 (2d ed.); 2 Blackst. Com. 348.

ning, was sufficient. We do not concur in the latter conclusion, after the decision, which appears to us quite satisfactory, of the case of *Fryer v. Coombs*, 11 A. & E. 403; (a) (E. C. L. R. vol. 39) and, whether the former opinion be correct, where the party does not claim under the tenant in tail, is in our judgment a questionable matter.

But it is not necessary for us to decide that point, nor the other on the Statute of Mortmain; as we think the avowry bad, for another reason, which appears not to have been discussed in the Court of Queen's Bench. That objection is the want of an express averment of an attornment of the terre-tenant upon the grant of the rent by the trustees, or of some equivalent allegation. This objection was taken for the first time on the argument in the Court of Error; and it is not stated as a ground of special demurrer: and the question therefore is, whether it is good on general demurrer. In order to make a grant of the rent by the trustees valid, attornment of the terre-tenant was certainly necessary. If it had been a grant by the Crown no attornment would have been required; Co. Lit. 309 b; but the grant of the trustees is the same as a grant by private individuals. It is also a common law conveyance only, so far as appears in these pleadings, and did not operate under the Statute of Uses; and, consequently, attornment cannot be dispensed with on that ground.

*929] *Four answers were made to this objection. First: that the conveyance might have been made after the statute 4 Ann. c. 16. Secondly: that there was a sufficient averment of attornment by payment of rent. Thirdly: that attornment was to be implied, because there was an averment that the Dean and Chapter were seised of the rent, and that the rent was due and in arrear to them, which could not be unless there had been an attornment to them. And lastly: that, if the want of an attornment was an objection, it was not available on general demurrer.

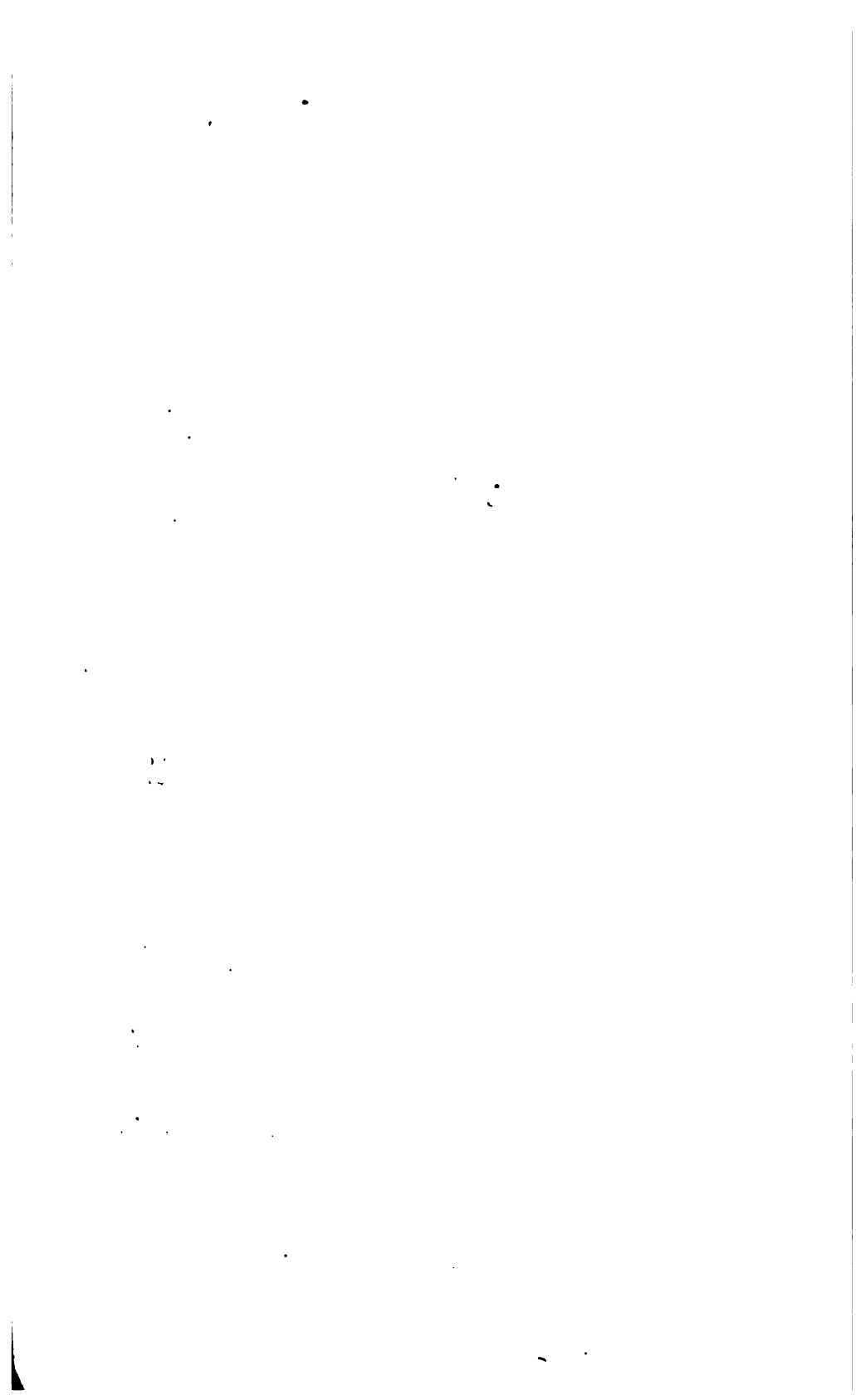
We are sorry to be obliged to come to the conclusion that none of these answers are satisfactory. As to the first, we cannot make any presumption either way. The defendants must show a title; and, if this part of it depends upon the transfer being subsequent to stat. 4 Ann. c. 16, that fact should have been truly averred. No doubt it could not have been truly averred. As to the second answer, there are two reasons against it: the first, that, in order to make the payment of rent an attornment in law, it must be made to the grantee of the rent: Co. Lit. 315 a, Com. Dig. *Attornment* (B 2); and the averment is only that the rent was duly paid, not saying to whom; and, secondly, every attornment must be in the life of the grantor; Co. Lit. 309 a, Com. Dig. *Attornment* (D); and the life of the trustees at the time of payment is not averred. With respect to the third answer, the aver-

(a) *Brooke v. Spong*, 15 M. & W. 153,† was cited in the argument below. See *Harrold v. Whitaker*, 11 Q. B. 147 (E. C. L. R. vol. 63).

ment, "whereupon and whereby" the corporation was seised and continued seised, is not a positive averment of the fact, but only a statement of the conclusion of law from the fact of the conveyance. As little will the averment, that a sum was "due and *in arrear" at the time of the distress, cure the defect of title for want of attorn- [*930]ment. If it does not cure the want of the averment that the estate tail continued (as the case of *Fryer v. Coombs*, above referred to, shows), it will be equally ineffectual in curing this defect. In truth it is only equivalent to an averment that the rent had not been paid; and, on a plea of *riens in arrear*, the plaintiff could have shown payment only, and would not have been permitted to prove the defect in the conveyance to the defendants. One point only remains to be considered. Assuming the title to be defective for want of attornment, is the objection available on general demurrer, it not having been pointed out specially? It is clear that, after a verdict on a plea putting in issue the averment of the grant of the rent to the Dean and Chapter, the objection could not prevail; it would be cured by verdict at common law on the ground that, unless the terre-tenant had in fact attorned, the verdict could not have been found for the defendants, as the Judge must be presumed to have told the jury that attornment was necessary to the validity of the grant, and that, if there was none, no grant could be found. It would be reasonable to say, if there were no authority on the subject, that, if attornment was implied in the term "*grant*," where there was an issue denying it, it must be implied where the grant was admitted on the pleadings by the special plea, or traverse of some other matter, or judgment by default; and that the allegation of a grant was an informal mode, only, of alleging a grant and an attornment. But the authorities are very strong that such a *defect could not have been cured after verdict by the statute of jeofails as a [*931] defect on account of form, and therefore would not have been cured after judgment by default. It is not a mere matter of form, within the meaning of the statutes 16 & 17 C. 2, c. 8, and 4 Ann. c. 16, s. 2; and, if it be not a matter of form, omission, or defect, under those statutes, we cannot say that it is, under the statute 27 Eliz. c. 5, or the 1st section of the 4 Ann. c. 16, a mere "imperfection, omission, or defect," which would only be available on special demurrer. It appears to be a general rule that whatever would be bad after judgment by default would be bad on general demurrer; and the authorities show that such a defect as this is bad after judgment by default. The authorities to that effect have been generally adopted by the text writers; note (1) to *Stennel v. Hogg*, 1 Wms. Saund. 228 (6th ed.), 2 Tidd's Pr. 919 (9th ed.).

We think, therefore, that the decision of the Court of Queen's Bench must be reversed.
Judgment reversed.(a)

(a) The case in error is reported by H. Davison, Esq.



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to perform the agreement, take the license, and pay their own costs; of which plaintiffs had notice.

Held bad, on special demurrer.

For that, if the agreement were construed as an accord in respect of the things to be done, there was no averment of satisfaction, the stipulations of defendants not having been all performed; and, if the making of the agreement itself was relied upon there was no allegation, expressed or implied, that the agreement was accepted in satisfaction.

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appeared that they would become such tenants.

The declaration went on to allege that defendant received the rents and profits, and ought as bailiff to have rendered an account of what he received more than his share, but had not rendered such account.

The plea set out the deed, which appeared to be to the effect stated in the declaration: and it alleged that L. did appoint, setting out the appointment, which showed that plaintiff and defendant were not tenants in common. The plea concluded with a verification.

Held, on special demurrer, a good plea; for that the fact of this appointment ought not to have been pleaded as a traverse of the allegation of non-appointment, such allegation in that count being unnecessary; and that, even if such allegation had been necessary, it was still necessary for the plea to set out the appointment, in order to show its effect. *Ricketts v. Loftus*, 482

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Notice of distress for rent under 1 stat. 2 W. & M. c. 5, s. 2, stated that the broker had taken the goods mentioned in the inventory underwritten, which inventory was: "One clock and weights, &c., and any other goods and effects that may be found in and about the said premises to pay the said rent and expenses of this distress." Held sufficient, it appearing that the distress was in fact meant to include all the goods on the premises. *Wakeman v. Lindsey*, 625

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That either the remedy of the landowners against the trustees was in Equity for a breach of trust, or, if the landowners had a legal right, their remedy was by quare impedit; and that in either case the mandamus would not lie.

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such an affidavit, it is not necessary to show that an action had commenced before the affidavit was sworn.

2. Where an indictment contains several counts, and a defendant is convicted on each, a judgment, that the defendant, "for the offence charged upon him in and by each and every count of the indictment aforesaid, be imprisoned in," &c., "for the space of eight calendar months now next ensuing," is correct, and means that the defendant shall be imprisoned for the same eight months upon the charge in each count.

3. After a verdict of Guilty, on an indictment, and prayer of judgment, the record stated that it appeared to the Court "that the verdict was unduly given," and the Court "vacated and made void" the verdict, and all other process against the first jury, and ordered that a new jury should come, because the coroner and defendant had put themselves on the last-mentioned jury. A second verdict of Guilty was found; and judgment passed thereon. Such entry is sufficient on writ of error, though no reason be assigned on the record for holding the first verdict to have been unduly given. *King v. The Queen*, 31

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Held, that the inference from these facts was that K. did not transfer the property in the corn to plaintiff, subject to a lien, but only transferred the property to plaintiff on the condition of his paying the bill of exchange, and that, in the mean time, the corn was the property of defendant.

The corn having arrived in England, and the bills of exchange and lading having been forwarded to England by defendant, the bill of exchange was accepted by plaintiff. On its maturity, he offered to take it up: but it was not produced, owing to a mistake of defendant's agent in England as to its place of deposit. On a later day the bill of exchange was presented to plaintiff, who did not pay it.

Held, that defendant, under these circumstances, was entitled to retain the corn. *Jenkyns v. Brown*, 496

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Plaintiff and defendant being resident in England, and P. at Havana, and defendant being a foreign agent, a written agreement was entered into by plaintiff with defendant "in behalf and representation of P. of Havana" (so stated in the agreement), that plaintiff would proceed as fireman and stoker on board the T. steamer, then about to leave London for Havana, calling at intermediate ports, to be placed in the service of P., and would faithfully do the work of fireman or stoker on board the T., and obey the orders of the engineers. In consideration of the service, plaintiff was to receive wages at 5*l.* per month, payable monthly, and 2*l.* per month for providing himself in provisions. During the outward passage, rations were to be served out to plaintiff on account of P. The contract to be understood to be in force for one year certain from the date; and, should plaintiff be discharged before that time, three months' wages to be paid in advance, besides finding him a passage home; P. being at liberty to confirm and continue the engagement on the terms stated, or to discharge plaintiff and to find him his passage back to England: the wages to be payable up to the day of plaintiff's arrival in England, unless he should be discharged for misconduct: one month's pay to be advanced for plaintiff's outfit for the voyage.

Held:

1. That the agreement did not require a stamp, being within the exemption "memorandum or agreement for the hire of any labourer," in stat. 55 G. 3, c. 184. Schedule, Part I. tit. *Agreement*.

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In support of these averments, proof was offered that the goods had been, in the first instance, stolen or received by P., a person known to defendant. The Judge amended the pleas, substituting P., by name, for the person unknown.

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Notice of recognisance, under stat. 8 & 9 Vict. c. 10, s. 3, is sufficient, though it do not state that the recognisance has the several conditions required by that clause, but, only, that it is conditioned for trial of the appeal. *Regina v. Holborow*, 421

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But a distringas for that purpose, obtained by the plaintiff without wilful deception upon the Court, while the defendant was abroad,

was irregular only, and not a nullity; and the defendant might, by laches, disable himself from moving to set aside the process.

Plaintiff obtained (without intentional deception) a *distringas* to compel appearance, while defendant was abroad. Defendant had left England in September; the writ issued in December; appearance was entered, and proceedings were carried on to execution, defendant being still abroad. The seizure took place in February. Defendant, in an affidavit made for the purpose of setting aside the proceedings, deposed that he first heard of the execution in March, when on his return to England, and that, having been delayed by illness, he did not arrive in London till June 2d. A week afterwards he moved (in term) to set the *distringas* and execution aside. It appeared, however, that he had arrived at Ostend on the 30th of April; and the interval between that time and June 2d was not conclusively accounted for. Held, that the motion was too late, and that the proceedings could not be disturbed. *Brough v. Eisenberg*, 446

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ferred. On motion to attach him for contempt, or to set aside the verdict on the indictments:

Held, that it would have been illegal to refer an indictment for perjury, or, *semble*, for conspiracy; but that the indictments were not referred, and the verdicts of acquittal, given on the ground that no evidence was produced, must at all events stand; and there was nothing illegal in referring all matters in difference and at the same time consenting to a verdict of acquittal, unless there was a corrupt agreement to stifle a prosecution, which in the present case did not appear to be the fact.

Held, also, that the arbitrator could not be considered as appointed by an order or rule made in an action, within the first branch of stat. 3 & 4 W. 4, c. 42, s. 39, and it was doubtful whether the order of *Nisi prius* could be treated as an agreement within the second branch. *Quære*, also, whether the order at *Nisi prius* was good, there being at the time it was made no cause before the Court.

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Held: that the agreement was illegal, as referring an indictment to arbitration; and, an award having been made, the Court refused, on motion, to order payment of costs in pursuance of the award, though the submission had been made a rule of Court according to the agreement.

Per Lord CAMPBELL, C. J. The matter in difference was not legally a subject of reference, the question as to liability being of public concern. *Regina v. Blakemore*, 544

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Effect of recital that the debt is due, 781. *DEED*, I.

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For revoking submission, 529. *ARBITRATION*, I. 1.

ATTORNMENT.

Of terre-tenant to grantee of rent, 911. *CROWN*, II. 1.

ATTORNEY.

I. Of Court of Great Sessions in Wales.

When not qualified to practise in Courts at Westminster.

An attorney of the Court of Great Sessions in Wales, who was in actual practice at the passing of stat. 11 G. 4 & 1 W. 4, c. 70, and who, under stat. 55 G. 3, c. 184, Schedule, part 1, has paid for his admission a stamp duty of 25*l.*, but paid only 60*l.* on his articles of clerkship, and who has, under stat. 11 G. 4 & 1 W. 4, c. 70, s. 16, and before the passing of stat. 6 & 7 Vict. c. 73, been admitted on the shilling roll, but has not been admitted in the superior Courts of Westminster under sect. 17 of the first-mentioned statute, is, under stat. 6 & 7 Vict. c. 73, s. 35, guilty of a contempt if he practise in a Superior Court of Westminster in a cause where the defendant did not reside in Wales or Cheshire at the commencement of the suit:

Although the irregular act is not shown to have been done knowingly or wilfully. *Re Humphreys*, 388

II. Contempt of Court by practising irregularly. Though not knowingly, 388. *Ante*, I.

AUDITOR.

COMPANY, V.

AUTHORITY.

Excess of.

When not ground for quashing order, 425 *POOR*, XXIII. 1.

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For rent seek, under grants from the Crown and its trustees, 911. *CROWN*, II. 1.

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I. Generally. *ARBITRATION*.

II. Of Enclosure Commissioners, with respect to highways, 735. *ENCLOSURE*, I. 1.

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I. Time of swearing, 31. *AFFIDAVIT*, I.

II. Perjury in, 31. *AFFIDAVIT*, I.

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Sale of, 621. *VENDORS*, IV. 2.

BASTARD.

I. Second application.

1. After dismissal of first on the merits.

Under stat. 7 & 8 Vict. c. 101, s. 2, a refusal by justices to make an order for maintenance of a bastard, though on the merits, is no bar to a second application. And, if justices refuse to entertain such second application on the mere ground of the first refusal,

the Court will order them by mandamus to hear.

The justices, on a second hearing, may nevertheless take into consideration, with a view to forming their decision, the fact and circumstances of the former hearing. *Regina v. Mcken*, 74

2. What may be taken into consideration on second hearing, 74. *Ante*, 1.

II. Notice of recognisance.

When sufficient, 421. *APPEAL*, VII. 1.

III. Form of judgment on disallowance of appeal, 421. *APPEAL*, VII. 1.

IV. Settlement.

Evidence of mother being certificated, 611. *POOR*, XIII

BENEFICE.

I. Presentative.

Rights of clerk nominated but not presented, 139. *ADVOWSON*, I.

II. Trustees of.

How compellable to present, 139. *ADVOWSON*, I.

III. Suspension of incumbent.

1. Its operation in respect of perception of profits.

A sequestration issued on a judgment of this Court, against a beneficed clergyman: it was published, and the sequestrator entered into receipt of the profits of the benefice. Subsequently the defendant (by proceedings under stat. 3 & 4 Vict. c. 86) was suspended from all exercise of his office, and from receiving the fruits of his benefice, for eighteen months. The Bishop issued a sequestration on this sentence, to a different sequestrator, which was published: the judgment debt for which the first sequestration had issued being still unsatisfied. On a rule calling upon the bishop to show cause why he should not pay the plaintiff, at whose suit the first sequestration issued, the amount of profits of the benefice received,

Held, that the suspension, for the time of its endurance, operated in respect of perception of the profits, as amotion would have done, not only against the clerk, but against his creditors; and the rule was discharged as to the profits received after the second sequestration was published. *Bunter v. Cresswell*, 825

2. How a sequestration under a suspension affects a prior creditor's sequestration, 825. *Ante*, 1.

IV. Sequestration.

Concurrent sequestrations of different natures, 825. *Ante*, III. 1.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. Acceptance.

1. Conditioned for renewal, effect of.

A bill of exchange, drawn 28th November, 1836, payable forty-two months after date, was accepted thus: "Accepted on the condition of its being renewed until November 28th, 1844, without interest, payable by me at Messrs. Williams' and Deacon's, bankers, London."

Held, in an action by endorsee against acceptor, that this was a good acceptance, and was properly declared on as a bill accepted payable on 28th November, 1844.

An acceptance of a bill of exchange must be to pay in money, and an acceptance to pay by another bill is no acceptance. *Russell v. Phillips*, 891

2. Option of holder on conditional acceptance, 893. *Ante*, 1.

3. Must be to pay in money, 893. *Ante*, 1.

II. Renewal.

What it means, 893. *Ante*, I. 1.

III. Notice of dishonour.

When sufficient.

It is sufficient notice of dishonour to the endorser of a note if a person acting for the holder informs him that the note has been presented and dishonoured, though he does not add that the endorser will be looked to for payment, and though, at the time of such notice, he inquires of the endorser where the maker resides. *Chard v. Fox*, 200

IV. Payment of.

Tender to holder who has mislaid the bill, for what purposes not equivalent to payment, 496. *AGENT*, I.

V. Payment by.

Condition that the bill shall be paid, 496. *AGENT*, I.

VI. Pleading.

1. Declaration on acceptance conditioned for renewal, 893. *Ante*, I. 1.

2. Setting aside false plea of fraud in drawer and endorsement when overdue, 418. *PLEA*, I.

BILL IN EQUITY.

Page 504. *EXECUTORS*, V.

BILL OF EXCEPTIONS.

In misdemeanor; in *King v. The Queen*, 38, 40.

BILL OF LADING.

Effect of, 496. *AGENT*, I.

BISHOP.

Death of. *ORDINARY*.

BOND.

I. Stamp.

Though accompanied by other securities.

A bond made in 1812 conditioned to replace a sum of Government stock of the value of 792*l.* is sufficiently stamped with a *£l.* stamp, under stat. 43 G. 3, c. 149, Schedule, part 1, tit. *Bond*, though accompanied by a deposit of title deeds, and an agreement, insufficiently stamped, of even date, for the mortgage of property comprised in such title deeds as a collateral security. *Blair v. Ormond*, 732

II. In whom vested on death of obligee.

Administration bond, 249. *EXECUTORS, I.*

BOROUGH.

MUNICIPAL CORPORATION.

BOUNDARY.

Apportionment of liability to repair highway, 229. *HIGHWAY, II. 1.*

BRIDGE.

Under Railways Clauses Consolidation Act.

What width of road required and how measured.

The Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, s. 49, enacts that, when a railway is carried over a "turnpike road" by a bridge, the width of the arch shall be such as to leave thereunder a clear space of not less than 33 feet: other dimensions are given in the cases of "a public carriage road" and a "private road." Sect. 51 provides that, wherever the average available width, for the passage of carriages, of any existing roads, is less than the width hereinbefore prescribed for bridges over the railway, the width of such bridges need not be greater than such average available width; but so, nevertheless, that such bridges be not of less width in the case of a turnpike or public carriage road than 20 feet: and that, if such average available width shall be at any time increased beyond the width of such bridge, the Railway Company shall be bound to widen the bridge to such extent as they may be required by the trustees or surveyors of the road, not exceeding the width of the road as so widened, or the maximum width herein or in the special Act prescribed for a bridge in like case over the railway.

The effect of the last clause is, that, if the average available width for the passage of carriages on any road is more than 35 feet, the road may be narrowed to 35 feet under the arch; where it is less, the arch may be made of the same width as the road, so that it be not less than 20 feet wide: if the road be

afterwards widened, the arch must be widened in proportion, up to, but not beyond, 35 feet.

In this reckoning, footpaths are not to be taken into account. Therefore, where the road, including footpaths, was 43 feet wide, but without them only 28, and the railway arch, 35 feet in width, stood partly upon and narrowing the footpath, but left the carriage way of its original width: Held, on indictment for obstructing the carriage way, that stat. 8 & 9 Vict. c. 20 (ss. 49, 51), and a railway act incorporating it, were complied with.

Although the special Act provided that, wherever the railway crossed the road otherwise than at right angles, the bridge should be made with a skew arch (which had been done in this instance), "so as not in any manner to alter the direction of or interfere with the line of the said roads, or the footpaths to the same." *Regina v. Rigby*, 687

BRIDLEWAY.

Page 735. *ENCLOSURE, I. 1.*

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Nature of shareholder's interest, 116. *POOR, XI. 1.*

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I. What is a business, 196. *COUNTY COURT, II. 1.*

II. Place of business, 196. *COUNTY COURT, II. 1.*

II. Of a mine, 704. *MINE, I.*

CALL.

I. Liability for.

After transfer and before change in register; remedy.

S. sold railway shares, of which B., after intermediate sales and without any privity with S., became purchaser; and S. transferred them to B. by deed. S., at the time of the sale by him, was registered owner, and so remained, B. not having registered. After the purchase by B., a call was made upon S., which S. was obliged to pay, under stat. 8 & 9 Vict. c. 16, s. 15.

Held, that for such payment S. could not maintain an action against B. as for money paid to his use. *Sayles v. Blane*, 205

II. Declaration.

Allegation of the call being made "duly," 672. *POOR, III. 1.*

III. Defences to action.

1. What pleas allowable, and what not allowable.

Debt by a Railway Company against de-

fendant, alleged to have been the holder of shares, for calls alleged to have been "duly made."

Motion for leave to plead: 1. Never indebted. 2. Defendant not holder of shares. 3. That defendant was put on the register by fraud of the plaintiffs.

4. That defendant was mentioned in the plaintiffs' special Act as *having subscribed* to the undertaking; that by such subscription he became holder of the shares: and that he was induced to subscribe by fraud of the plaintiffs.

5. That the calls were made for fraudulent purposes, known to plaintiffs, and the making of them was a fraud on defendant.

7. (Retained by defendant on being put to his election between this and two similar pleas, 5 and 11.) That, before passing of the special act and formation of a register, and before the making of calls, defendant, an original subscriber, sold his scrip and interest, and the Company agreed with the vendee to register him for the shares, and that he should be the shareholder; but that they afterwards registered defendant for the shares against his will and that of the vendee; and that defendant never was the shareholder except as in this plea aforesaid.

8. Agreement between plaintiffs and defendant that the calls should be rescinded.

9. That the plaintiffs' Act was obtained by fraud of the plaintiffs and others.

10. Traverse of the calls being duly made as alleged in the declaration.

12. That, when the calls were made, capital had not been bona fide subscribed to a certain amount required by the special Act, but part of such subscription had been fraudulently obtained by plaintiffs; that there were no subscriptions to the said amount; and that until such subscriptions were made, plaintiffs had no power to make calls.

13. That notice of the calls was not duly given.

Pleas 1 and 2 were allowed.

Plea 3 was disallowed, as a plea to evidence, namely the anticipated evidence of the Register.

4. Disallowed as an inconsistent and bad plea.

6. Allowed.

7. Disallowed as an argumentative traverse of being shareholder.

8. Allowed.

9. Disallowed, as suggesting an inadmissible defence.

10. Disallowed, on the word "duly" being struck out of the declaration.

12. Allowed, as raising a fairly disputable question on the special Act and on the Companies and Lands Consolidation Acts, 1845.

13. Disallowed, the defence being provable under *Nunquam indebitatus. Waterford, &c., Railway Company v. Logan*, 672.

2. Defences arising out of fraud imputed to the directors, 672. Ante, 1.

3. Defence arising out of the non-subscription of capital, 672. Ante, 1.

4. Defence arising out of improper registration, 672. Ante, 1.

5. Defences admissible under traverse of being shareholder, 672. Ante, 1.

6. Defences admissible under *Nunquam indebitatus*, 672. Ante, 1.

CANAL.

I. Abstraction of water.

1. Remedy by action.

Stat. 34 G. 3, c. 78, empowered a company to purchase lands for making and maintaining a navigable canal, and contained provisions with respect to the conveyance of land, and its vesting in the company on payment of the price assessed by compensation juries. It was also provided by the same act (explained by stat. 46 G. 3, c. xx. s. 23) that manufacturers within a certain distance of the canal might, after notice to the proprietors of the canal, lay down pipes to supply their steam engines with water for the sole purpose of condensing the steam used for working such engines; and that, if any dispute should arise with any person desirous of taking water for the above purpose, or who should be in the use of taking the same, such dispute should be finally determined by certain Commissioners.

A declaration in case by the Company stated that the canal had been made and maintained by them in pursuance of the act; that defendants, having steam engines within the prescribed distance of the canal, had, after notice to the Company, laid down pipes communicating with the canal, and that defendants had used the water drawn off by such pipes for other purposes than condensing the steam of their engines.

It was objected in arrest of judgment, and afterwards on writ of error, that the declaration did not show any conveyance or ownership of the canal or water; nor did it show any invasion of a private right, or damage to such a right, inasmuch as the act complained of, if wrongful, was clearly prohibited by statute, so that a repetition of the act could never be used as evidence that it was right; also that the remedy was by indictment as for the violation of a statutory provision; and, further, that the complaint was a dispute over which the commissioners under the act had exclusive jurisdiction: Held by Exch. Ch., affirming the judgment of Q. B.:

That the declaration was good; that it

must be taken that the Company was in possession of the canal; and that, without averment of special damage, the wrongful act appeared to be a damage to the Company's right; that the disputes over which the commissioners had jurisdiction were disputes with persons, either about to use or in the actual use of the canal water for a rightful purpose, as to the mode of taking such water, and that the provision for reference to the Commissioners did not apply to a mere wrongful act.

Held also, per ERLE, J., that, even if such an act were within that provision, the superior courts had concurrent jurisdiction. *Rockdale Canal Company v. King*, 122

2. Form of declaration, 122. Ante, I.

II. Soil of.

1. When not vested without actual purchase, 81. CROWN, I. 1.

2. Ejectment for, so as not to interfere with easement, 81. CROWN, I. 1.

III. Commissioners for settling disputes.

1. Jurisdiction of Superior Courts, when not ousted, 122. Ante, I. 1.

2. Proceedings of Commissioners; interest, 854. CERTIORARI, I.

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Fraud in subscribing, 672. CALL, III. 1.

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1. Special damage, when not necessary, 122. CANAL, I. 1.

2. For abstracting water from canal for purposes not authorized, 122. CANAL, I. 1.

3. Wrongful acts tending to establish a right, 122. CANAL, I. 1.

II. Special. APPEAL. SPECIAL CASE.

CEMETERY.

Rateable value, 571. POOR, VI. 1.

CENTRAL CRIMINAL COURT.

Certiorari to remove indictments, 568. CERTIORARI, VIII. 2.

CERTAINTY.

Effect of the word "other," 1. MORTUARY.

CERTIFICATE.

I. Medical, 349. POOR, XX. 2.

II. Inferential evidence of, 611. POOR, XIII.

III. To exempt a society from rates, 789. POOR, V.

CERTIORARI.

CERTIORARI.

I. What may be removed by.

Judicial consent of Commissioners under a canal act.

By statute incorporating a Canal Company, all persons seized of freehold or copyhold estates of 100l. per annum in the county of G., and all persons residing therein and having personal estates of the value of 2000l., were appointed Commissioners for settling all questions and differences between the Company and the landowners, with power to take evidence on oath, and to assess compensation unless the parties should desire to have it assessed by a jury. The determinations of the Commissioners, the verdicts of the juries, and the Commissioners' judgments thereon, were to be deposited with the Clerk of the peace amongst the records of the Sessions. All the orders and proceedings of the Commissioners were to be entered in a book, and, being signed by them, to be deemed originals and received as evidence. Before acting, the Commissioners were to take an oath truly and impartially to execute their powers. No Commissioner was to act when interested. The Canal Company were to make bridges over the canal for the convenience of landowners, as the Commissioners should order; but, if landowners should find any of the bridges so ordered insufficient for the commodious use of the land, they were empowered, with the consent of the Canal Company, or, in case of their refusal for twenty-one days, then with the consent and approbation of the Commissioners, to make convenient bridges at their own costs.

By an entry of the Commissioners' proceedings, made as above, it appeared that a landowner had applied to the Commissioners at a meeting convened by public notice under the Act, for their sanction to the building of a bridge at his own cost; and that the Commissioners, after hearing evidence for the applicant, and counsel for the Company in opposition to the claim, gave their consent.

Held that the consent was a judicial act, and that the entry of it might be brought up by certiorari.

The application was on behalf of B., the owner of lands adjoining the canal: in fact, however, the bridge was not wanted for the use of his lands, but to bring coals from a colliery lying beyond them, which coals would be carried by the proposed bridge across the canal to a railway, and by that railway to the town of C., instead of going by the canal. The Chairman and several directors and shareholders of the Railway Company were sworn and acted as Commissioners when the application was heard and granted.

Held that, by reason of the interest they had in the result, the proceedings were void.

Quære, whether the accidental intrusion of one interested person, out of so large a body of Commissioners, would have vitiated the proceedings.

The statute enacted that no meeting of the Commissioners should be held unless notice of the time, &c., of such meeting should be given in a county newspaper at least sixteen days before such meeting.

By above-mentioned entry, returned to a certiorari, it appeared that the meeting was held on February 12th, in pursuance "of a summons and notice in the M. G. newspaper" (a county newspaper) "of the 27th of January." The notice, as well as the newspaper, was dated of that day.

Held that the notice was insufficient, and that, on this ground also, the proceedings were bad and must be quashed. Although it appeared by affidavit that copies of the newspaper dated 27th were in fact published and circulated on the 26th. *Regina v. Aberdare Canal Company*, 854

II. When the proper remedy.

1. What objections not open on, 789. *Poor*, V.
2. Where interested parties have acted judicially, 854. *Ante*, I.
3. Where a judicial act has been performed with less than the statutory notice, 854. *Ante*, I.

III. Where it does not lie: generally.

Objections may be taken on the return, 293. *Poor*, XVI. 1.

IV. Where it does not lie: particular instances.

To bring up order for removal of lunatic to asylum, 293. *Poor*, XVI. 1.

V. When refused.

Where no want of jurisdiction, 25. *COMPENSATION*, I.

VI. Practice.

When too late to urge that the rule for the certiorari does not specify the objections, 344. *Poor*, XVII. 2.

VII. Statement of objections in rule.

Enactment not retrospective, 221. *Poor*, XIV.

VIII. To remove indictments.

1. From Central Criminal Court, after removal into that Court.

When an indictment at Sessions, under stat. 25 G. 2, c. 36, for keeping a disorderly house, has been removed by prosecutor or defendant into the Central Criminal Court under stat. 4 & 5 W. 4, c. 36, s. 16, the opposite party may remove it again into this

Court notwithstanding stat. 25 G. 2, c. 36, s. 10. *Regina v. Brier*, 568

2. To remove indictment for keeping disorderly house, 568. *Ante*, I.

CHANCEL.

Obligation to repair, 869. *PROHIBITION*, III. 2

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- I. What order countersigned by him is not his order, 554. *HABEAS CORPUS*, I. 1.

- II. Committal by Vice-Chancellor for breach of objectionable order of Lord Chancellor, 564. *HABEAS CORPUS*, I. 1.

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CHILD.

PARENT AND CHILD.

CHURCH.

- I. Repair, of chancel, 869. *PROHIBITION*, III. 2.

- II. *BENEFACT. ECCLESIASTICAL LAW.*

CLERGYMAN.

- I. Officiating.

Removal of lunatic by his order, 293, 349. *Poor*, XVI. 1.

- II. Suspension, 825. *BENEFACT*, III. 1.

- III. Sequestration, 825. *BENEFACT*, III. 1.

CLERK.

- I. Parish, 700. *REGISTER*, I.

- II. To guardians, 287. *Poor*, XII. 1.

CLERK OF THE PAPERS.

Of the Queen's Prison: his office and fees.

The Clerk of the Papers of the Queen's Prison, appointed, under stat. 5 & 6 Vict. c. 22, by the Secretary of State at a fixed salary, holds in effect the same office as the Clerk of the Papers of the Queen's Bench Prison, appointed, under stat. 27 G. 2, c. 17, by the Marshal of the Marshalsea: and that office was one belonging to the Court of Queen's Bench, and consequently within the provisions of stat. 11 G. 4 & 1 W. 4, c. 58, and 1 & 2 W. 4, c. 36.

Held, therefore, that the Clerk of the Papers of the Queen's Prison is entitled to insist on payment to him of the fees sanctioned by the Commissioners under stat. 1 & 2 W. 4, c. 36, in order that he may account for them to the Treasury. *Markwell v. Dyson*, 820

CLERK TO JUSTICE.

I. His fees.

1. For summonses in Metropolitan Police District.

By the Metropolitan Police Act, 10 G. 4, c. 44, s. 37, all sums adjudged by justices of peace to be paid for any offence against the Act are to be paid to the Receiver of the Metropolitan Police District, who, by sect. 10, is to apply all moneys applicable to the purposes of the Act to payment of salaries, &c., of the police force, and of all other charges and expenses in carrying the Act into execution. By stats. 2 & 3 Vict. c. 47, 2 & 3 Vict. c. 71, and 3 & 4 Vict. c. 84, certain penalties inflicted by magistrates within the Metropolitan Police Districts are to be paid over to the Receiver, who is directed to pay salaries, expenses, and charges attending the Metropolitan Police Courts, and in carrying the Acts into execution, and to apply the sums which he receives to the purposes of the Act. And the clerks of the magistrates within the district are to keep an account of such fines and penalties, to be rendered to the Receiver quarterly; and the magistrates are to cause the amount to be paid to him. The clerks of the justices of a part of Surrey, within the Metropolitan Police District, for which no Police Court had been established, claimed to deduct from the amount payable to the Receiver the amount of their fees for summonses granted on the application of officers of the police force.

Held: that the clerks were entitled to such fees; but that they were not entitled to deduct them from the amount payable to the Receiver or in any way to recover them from him, the payment of such fees not falling under the description of carrying the Acts into execution. *Wray v. Chapman*, 742

2. How recoverable, 742. Ante, 1.

II. Application of penalties received by him, 742. Ante, I. 1.

CO-DEFENDANT.

I. Acquittal of, at close of plaintiff's case, 625. ACQUITTAL, I.

II. Error brought by, 148. CONSPIRACY, I. 1.

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I. Generally.

1. What is a judicial act, 854. CERTIORARI, I.
2. Effect of interested Commissioner acting judicially, 854. CERTIORARI, I.

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I. By judge having competent jurisdiction, 554. HABEAS CORPUS, I. 1.

II. Direction of warrant, 759. Post, IV.

III. Without jurisdiction: liability of judge, 841. COUNTY COURT, I. 1.

IV. Expenses of conveying prisoners to gaol.

When to be paid out of the county rate, the expenses being incurred by a Metropolitan police constable.

Under stats. 27 G. 2, c. 3, 10 G. 4, c. 44, 2 & 3 Vict. c. 47, and 11 & 12 Vict. c. 42, if a prisoner be committed for trial for felony to the county gaol, for an offence committed in the county within the Metropolitan police district, the committal being by a county magistrate within such county and district, and the warrant be delivered to a Metropolitan police constable, a county magistrate may order repayment by the county treasurer to the Metropolitan police constable of the expenses incurred by him in conveying the prisoner to the gaol, the prisoner himself having no funds available for that purpose. And the county treasurer is liable to an action on the case if he refuse to pay under such order.

It makes no difference that the warrant on the face of it, is directed to the parish constable: because (1) the proper persons to execute it are the Metropolitan police constables; and (2) the treasurer is not authorized to inquire whether the proper constable has executed the warrant, but must obey the order.

So, in the case of a committal for trial for misdemeanour.

So, in the case of summary conviction, and sentence of fine, and imprisonment in default of payment, and committal upon such default, by order under stat. 11 & 12 Vict. c. 43, s. 23.

So, in the case of a remand on a charge of felony or misdemeanour, whether the prisoner is ultimately committed for trial or not.

So, where the warrant of commitment is directed only to the keeper of the county gaol.

So, where the magistrate who issues the warrant is a Police magistrate, sitting in a Metropolitan Police Court, under stat. 10 G. 4, c. 44, 2 & 3 Vict. c. 71.

So, where the magistrate who makes the order on the treasurer is such a Police magistrate.

So, where there is no express direction of the warrant.

So, where the committal is for a refusal to enter into recognisances to appear at Sessions, and to keep the peace in the meantime.

So, where the committal is for further examination, on a charge of felony or mis-

demeanor, but the prisoner is afterwards summarily convicted of misdemeanor.

But, where a prisoner is remanded for re-examination, and the keeper of the gaol delivers such prisoner to a constable to be conveyed before the magistrates, the constable is not entitled to be remunerated from the county rate for the expense of such conveyance.

Though he would be so entitled if he conveyed him before the magistrate by order of the magistrate. *Leverick v. Mercer*, 759

COMMODITIES.

Belonging to land, 25. COMPENSATION, I.

COMMUTATION.

TITHE.

COMPANY.

Joint stock, incorporated and other public Companies.

I. Provisional Registration.

1. What title cannot be assumed.

A Joint Stock Company provisionally registered under stat. 7 & 8 Vict. c. 110, cannot assume a title denominating it a corporation.

The Court, therefore, refused to compel the Registrar by mandamus to register a proposed change of the name of such Company from The Sea, Fire, &c., Assurance Company, to The Sea, Fire, &c., Assurance Corporation.

Although a mandamus to the Registrar had been granted, and the objection on his part to the legality of such change was first raised upon the return. *Regina v. Whitmarsh*, 803

2. Mandamus to Registrar to register a change of name, 803. Ante, I.

II. Title.

Of Company provisionally registered, 803. Ante, I. I.

III. Commissioners.

1. Effect of interested Commissioners acting judicially, 854. CERTIORARI, I.
2. Effect of their proceeding without sufficient notice, 854. CERTIORARI, I.
3. Jurisdiction of, when it does not extend to wrongful acts, 122. CANAL, I. I.

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1. Their salaries, when not deducted in ascertaining rateable value, 571. POOR, VI. I.
2. Personal remuneration to, when deducted in ascertaining rateable value, 587. POOR, VI. 2.
3. Fraud imputed to, 672. CALL, III. I.

V. Auditors.

Their salaries not deducted in ascertaining rateable value, 571. POOR, VI. I.

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1. Alleged fraud in subscribing the requisite amount, 672. CALL, III. I.
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1. Transferor until registration of transfer, 205. CALL, I.
2. Pleading, 672. CALL, III. I.

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1. Obligation to register transfer, 205. CALL, I.
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3. Only prima facie evidence of the party being shareholder, 672. CALL, III. I.
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4. Power of Company to sell and convey, when not implied.

The South Wales Railway Company, having power to take and purchase lands and to construct a railway according to the plans and books of reference deposited under their Act, gave notice to the Llanely Railway and Dock Company that they (the South Wales Railway Company) required to purchase a small piece of land, on part of which the Llanely Railway was actually constructed, such piece of land being set out, in the said plans and books of reference, as part of the proposed line of the South Wales Railway: but they afterwards refused to issue their warrant to the sheriff to assess the amount of purchase-money, on the ground that the Llanely Railway and Dock Company had no power under their Act to sell any portion of land on which their railway was constructed.

Held, on mandamus to the South Wales Railway Company to issue their warrant, that, as there was no express clause in any special or general Act of parliament, which authorized either the Llanely Railway and Dock Company to sell any part of their actual line of railway, or the South Wales Railway Company to purchase it, the authority was not to be implied from the general power given to the South Wales Railway Company to make their line, and to purchase lands, according to their deposited plans and books of reference. *Regina v. South Wales Railway Company*, 902

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A compensation jury, of the city of L., awarded compensation to a landowner, under stat. 8 & 9 Vict. c. 20, s. 6, in respect of the works of a railway Company, by which he alleged that his land was injuriously affected.

The land was divided from the railway works by a river. The land was in the city; the works were not. The mode in which the works injuriously affected the land was, that they obstructed the access to a ferry over the river and appurtenant to the land in question. Held:

That, as the land lay in the city, the inquisition was rightly taken there.

That the ferry might pass with the land, under a conveyance of the land with "all profits and commodities belonging to the same;" and that, where, as far as living memory went, the land and ferry had always been enjoyed by the same person, and there was no evidence to show that they ever had been the subjects of separate conveyances, a compensation jury were justified in concluding that the ferry did pass with the land under the above words. At all events, that there was no such want of jurisdiction as to call for a certiorari or prohibition. *Regina v. Great Northern Railway Company*, 25

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1. The conspiracy shown to be unlawful by reason of the overt acts charged.

An indictment for conspiracy alleged that C. died possessed of East India stock, leaving a widow; that defendants, unlawfully, &c., conspired by false pretences and false swearing, &c., unlawfully, &c., to obtain the "means and power" of obtaining such stock: that, in pursuance of such conspiracy, defendants caused to be exhibited in the Prerogative Court of Canterbury a false affidavit made by one of them, in which the deponent stated that C.'s widow had died without taking out administration to C., and that deponent was one of her children: and it then alleged that defendants fraudulently obtained to deponent, as one of the children of C., a grant of administration to his estate. The indictment contained other similar overt acts, and charged that by means of them defendants did obtain the means and power, &c., and did get possession of the said stock.

On motion in Q. B. to arrest the judgment,

on the ground that a charge of conspiracy to obtain the "means and power" of obtaining the stock did not describe any offence:

Semble, that the statement of the overt acts done in furtherance of the object of conspiracy was so interwoven with the charge of conspiracy itself as to show an unlawful conspiracy. But

Held, that, at all events, the overt acts in themselves constituted a misdemeanor, on which the Court could legally pronounce judgment.

Admitted, that a count which merely charged a conspiracy in the same manner without alleging the overt acts was bad.

W., being indicted in Q. B. for a conspiracy, pleaded Guilty; whereupon it was adjudged that he be convicted; and a day was given him, by cur. adv. vult, to hear judgment; and he was afterwards outlawed for non-appearance. He afterwards came into Court in custody, and brought error in Q. B., assigning error in the record, process, and publication of outlawry, and in pronouncing the judgment of conviction, and praying that the outlawry and conviction might be reversed, and that he might be restored to all he had lost by the outlawry. The Coroner, for the Crown, joined in error, pleading that neither in the record and process, nor in the publication of the outlawry, nor in pronouncing the judgment of conviction, was there error; and praying that the outlawry might be confirmed. It was admitted that the process of outlawry was erroneous. Held, in Q. B.: that it was sufficient to give judgment merely reversing the outlawry, without any notice of the judgment of conviction. Judgment affirmed in Exch. Chamber.

Per Lord DENMAN, C. J.: One of two defendants, convicted of conspiracy, may bring error on the judgment without the other.

The following points were decided by the Court of Exchequer Chamber:

1. W. not having appeared on the day given him to hear judgment (as above), a capias issued, which was followed up by process of outlawry. Afterwards the outlawry was reversed, and judgment passed on the conviction. Upon error brought on this judgment, Held that no objection could be taken to want of continuances from the time of the non-appearance to that of the reversal of outlawry, the discontinuances up to the outlawry merely affecting the outlawry, which had been reversed; and no continuances being necessary during the proceeding to, or existence of the outlawry.

2. The record of Q. B. (into which court the indictment had been removed by certiorari) commenced "Pleas before," &c. "of the term of Saint Michael, in the 4th year"

of W. 4, being the term of the appearance of defendant in Q. B. Then followed regular continuances down to the non-appearance: then the outlawry: and then, after an interval of several terms, an entry "Hilary term in the 9th year of the reign of Queen Victoria," being the term in which the defendant was brought into Court after the outlawry: then an entry "and now, that is to say on the 26th day of January in this same term;" recording the bringing in of the defendant. Held that this was a sufficient commencement of the proceedings subsequent to the outlawry, without a fresh Placita.

3. Held also, that it was sufficient for the record to state that the defendant, "being a prisoner in custody by virtue of a warrant theretofore issued upon the said judgment of conviction and outlawry, is brought in custody aforesaid into Court here," without further describing the process under which he was taken.

4. The jury process was made returnable on one of the three days before full term; and on the same day a continuance by new venire was awarded. Held, not erroneous; inasmuch as the return day was conformable to stat. 1 W. 4, c. 3, s. 2, and the Court, though not sitting for the despatch of business before full term, might award the continuances on the return days.

5. That, even if there had been a discontinuance in the jury process, the defendant waived the objection by afterwards pleading Guilty.

6. Two defendants being indicted for conspiracy, one of them cannot, on writ of error, object to a discontinuance in the process against the other. *Wright v. The Queen*, 148

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8. and another, the deacons of a Baptist Congregation, being receivers of its general funds, and managers of its finances, bound themselves (by writing) to J. E., then resigning the office of minister of the church, to repay him, with half-yearly interest, 706*l.*, which he had advanced for the building of a chapel. Besides the general revenue above mentioned, there were funds vested in trustees, which were usually applied to the maintenance of the minister for the time being, and were likewise applicable to the relief of the poor. After the undertaking to J. E., a

new minister was appointed; and he agreed with the Congregation that he would be responsible to S., who was still deacon, and to any future deacon or deacons, for the continued repayment of J. E.'s debt; and he also consented that periodical payments of it should be made out of the trust funds. S. afterwards resigned: and the new minister gave him a written undertaking as follows:

"In consideration of your having resigned the office of deacon and your connexion with the Baptist Church," at, &c., "I hereby agree to hold myself responsible to you for the payment of the sum of 150*l.*, due to the Rev. J. E. by the Baptist Church," &c., "and also the interest for the same, at the rate," &c. (5 per cent., payable half-yearly), "being the residue of the sum of 700*l.*, principal and interest, remaining unpaid, for which you "became responsible," &c., "by an instrument," &c. (the writing first above mentioned).

Held, on argument of a special case, in an action by S. on this promise, that the written instrument given by the minister showed a valid contract; for that the words might import either a past or a concurrent consideration on S.'s part, and that construction was to be preferred which made the instrument good. *Steele v. Hoe*, 431

2. Resignation of office, 431. Ante, 1.
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I. Award of: generally.

Equivalent to a judgment.

A person who has been twelve months a prisoner in execution for non-payment of costs, awarded on discharge of a rule for Prohibition, may claim the benefit of stat. 48 G. 3, c. 123. For, since stat. 1 & 2 Vict. c. 110 (sect. 18), such award of costs is, for the purpose of stat. 48 G. 3, c. 123, equivalent to a judgment, without any further order of the Court. *Re Lilley & Harvey*, 403

II. General rule as to giving costs to successful party.

On opposed application for mandamus.

The rule acted upon by the Court under stat. 1 W. 4, c. 21, s. 6, is, that, where an application for a mandamus is made and opposed, the unsuccessful party pay his costs, except under very peculiar circumstances.

And it was held not to be an excepted case, where the Sessions, in conformity with their own practice established for many years, had refused to hear an appeal because notice was not given of the entry and respite, and this Court had granted a mandamus to enter continuances and hear, and on such hearing the respondents had succeeded, without dispute on the merits. *Regina v. Surrey Justices*, 684

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1. When liable in trespass.

A judge of a court of Record is answerable in an action for an act done by his command when he has no jurisdiction, and is not misinformed as to the facts on which jurisdiction depends.

The plaintiff, who dwelt and carried on business at Cambridge, out of the jurisdiction of the Spilsby county court, was sued in that court by leave of the judge, under stat. 9 & 10 Vict. c. 95, s. 60, the cause of action having arisen within the jurisdiction of the court; and judgment was duly obtained against him. Afterwards, while the plaintiff still dwelt and carried on business at Cambridge, a judgment summons was issued by order of the judge of the Spilsby court under sect. 98, calling upon the plaintiff to be examined as to his estate and effects, and, the plaintiff not appearing, the judge, knowing the facts, but believing, nevertheless, that he had authority, made an order that the plaintiff should be committed for his contempt.

Held, that the commitment was without jurisdiction, and that, as the judge had ordered it under a mistake of the law and not of the facts, he was liable in trespass.

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2. In what cases he has jurisdiction: judgment summons, 841. Ante, I.

II. Place of business of defendant.

1. Not a place shifting with the avocations of a superior officer.

The Deputy Sealer in the Court of Chancery performed his duty, of affixing the Great Seal to certain instruments, in a room called the Sealer's room, adjoining the Court at Westminster or Lincoln's Inn where the Lord Chancellor sat for the time being; or in a room called the Sealer's room at the House of Lords when the Lord Chancellor attended the House judicially; and at other times in the Great Seal Patent Office, Quality Court, Chancery Lane.

Held, that the Sealer's room or office, not being a fixed place, but shifting with the avocations of the Lord Chancellor, could not be deemed a place of business for the purpose of giving jurisdiction to a County Court within sect. 128 of stat. 9 & 10 Vict. c. 95.

And *quære* whether the duty performed by the Deputy Sealer was a business at all, within that section. *Rolfe v. Learmonth*,

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2. What is a business, 196. Ante, I.

III. Title in question.

Decision of county court judge questioned in prohibition.

Declaration in prohibition, stating a plaint in the county court prosecuted by one Batty for use and occupation of land by Thompson (plaintiff in prohibition), who appeared and protested that the title to the said land was in question: averment that in fact the title was in question in the action. Plea, that, when Thompson appeared and protested, Batty also appeared and protested that the title was not in question, and required the defendant in prohibition, being judge, to hear and determine the action; that thereupon defendant, then being judge, did hear and consider the evidence, &c., of the plaintiff in prohibition in support of his said protest, and also the evidence, &c., of Batty on the other side, and, having heard and considered, did adjudge that the title was not in question.

Held, that, if such a plea admits the title to be in question, it is bad, for want of jurisdiction in the judge, by stat. 9 & 10 Vict. c. 95, s. 58; but, if it be taken as pleading the decision of a competent court, it is equally bad; for, although the inferior court must determine the point in the first instance, yet, there being no writ of error from the county court, the question must be open to the superior Courts on motion for a prohibition; and, on declaration in prohibition, the question is one of fact, to be decided by evidence.

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I. Property.

1. How far affected by lands' clauses in canal Acts.

B. was empowered by acts of parliament to make a canal: and he was authorized thereby to supply the canal from brooks within five hundred yards thereof, to dig and trench the adjacent land, and remove earth, trees, and other obstructions thereon, for making, using, and maintaining the canal and towing paths, and making, &c., trenches and watercourses, with similar powers as to roads and other conveniences connected with the canal; to enclose and appropriate such parts of the lands as should be proper for wharfs or quays; to set up, &c., posts, ditches, and fences, in places necessary for separating the towing paths from the adjacent lands; to lay earth and other materials requisite for the works; and do and perform all things necessary for the making, maintaining, and convenient use of the canal. It was provided that nothing should authorize B. to use the lands for any other purpose than that of the navigation. Provisions were made for the purchase and sale of such lands as should be wanted, for assessing the price and the damages to be paid by B. for the use of or injury to the lands: and, if he should be in possession of any lands for a certain space of time without using them for the canal, he was to reconvey his right and interest therein: and it was provided that the works and things made in forming a certain part of the canal should become the property of B.

Held, that no right to the soil of the lands, adjoining to the canal, and applied to the purposes thereof under the powers of the act (not being those comprehended under the last-mentioned proviso), passed to B. where there had been no actual purchase.

Certain of the said adjoining lands were the property of the Crown, in right of the Duchy of Lancaster; and such lands cannot be parted with by the Crown except under certain statutory regulations imposed by 1 stat. 1

Ann. c. 7, s. 5. The canal acts in question are later. The clauses authorizing the user of the lands, and providing for compensation for such user, mentioned the Crown, either expressly or by direct reference: the clauses confined to authorizing the purchase and providing for the assessment of the price mentioned only bodies politic, corporate, &c., parties having especial interest as guardians, trustees, executors, &c., and "all and every other person and persons whomsoever." Contracts of purchase were to be enrolled with the clerk of the peace. On payment or tender of the purchase-money, the lands purchased were to vest in B. Held, that the Crown had no power to convey lands under these clauses; and that, supposing such power to exist, no purchase could be inferred from the exercise by B. of the powers of entry and user given by the act; especially as no evidence of an enrolment was produced.

Conceded, that, upon the above construction of the statute, there could be no adverse possession by B. using the Crown land under the powers given by the acts:

And, therefore, that B. having within the time of limitation begun to occupy part of the Crown lands for purposes not connected with the canal, ejectment lay, on the demise of a lessee of the Crown, for lands so occupied, whether they had or had not been also used for the purposes of the canal under the statutory powers. But that possession was not to be given to the lessor of the plaintiff in such a manner as to interfere with B.'s easement. *Doe dem. The Queen v. Archbishop of York*, 81

2. Adverse possession against, 81. Ante, 1.

3. Power to convey lands, 81. Ante, 1.

II. Grant under stats. 22 C. 2, c. 6, and 22 & 23 C. 2, c. 24, of rents vested in the Crown.

1. What grant unauthorized: effect as a grant of a rent seek.

Henry VIII., being seised of lands in fee in right of his Crown, granted them, by letters patent, in tail male to W., reserving rent to himself, his heirs and successors. After the passing of stats. 22 C. 2, c. 6, and 22 & 23 C. 2, c. 24, Charles II., by letters patent referring to and professing to pursue the former statute, granted the rent to trustees named in sect. 2 of stat. 22 & 23 C. 2, c. 24, their heirs and assigns; and the trustees granted the rent to a Dean and chapter, and their successors for ever. Held in Q. B., and by the Court of Exchequer Chamber on error, that the grant to the trustees was not authorized by either statute, the rent being reserved upon an estate whereof the reversion was in the Crown, and therefore being within the exception in sect. 3 of stat. 22 C. 2, c. 6.

Held in Q. B., and *Semble* by Exch. Ch. on error, that on demurrer to an avowry for a

distress on the land by the Dean and chapter, stating the conveyances as above, but not setting out the recitals or the terms of the grants, it was to be taken that the truth appeared on the face of the grant of the rent to the trustees, and therefore that the Crown did not appear to be deceived (as not having the power to grant the rent in fee simple), nor was the grant void on that account; but that it operated, not as a grant in fee simple, but of a rent determinable on the failure of the estate tail: and, further, that there was thus no ground for the objection, that a subject might have a right to distrain on the Crown when the reversion fell in: although the avowry alleged that the trustees became seised in fee of the rent. Also that the grant in effect, by severing the rent from the reversion, converted it from a rent service to a rent seck; which, if paid for three years of the space mentioned in stat. 4 G. 2, c. 28, s. 5, might be distrained for.

Held by Q. B., and *Semble* by Exch. Ch. on error, that the grant of such rent seck by the trustees to a Dean and chapter was not void by the Statutes of mortmain, the rent not being perpetual.

Held, by Q. B., that it was sufficient to aver in the avowry, that the rent reserved became due and in arrear, without an express averment of the continuance of the estate tail. *Semble* contra, by Exch. Ch. on error.

Held, by Exch. Ch. on error, that the avowry was bad on general demurrer for not expressly averring attainment by the tenant to the grant by the trustees, or that such grant was made after stat. 4 Ann. c. 16; and the defect was not supplied by an averment that the rent had been paid, not saying to whom, and not saying that the payment was in the life of the grantor; nor by an averment, following the statement of the grant by the trustees, "whereupon and whereby" the grantees became and were seised of the rent, and an averment that the rent was due and in arrear to them. *Vigers v. Dean of St. Paul's*, 911

2. Avowry under, what it must show, 911. Ante, 1.

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1. Necessity for averring plaintiff's readiness and performance of conditions precedent.

Assumpsit on an agreement "to give yearly free to the plaintiff during three years twenty tons of coals, to be put free on board ship at Cardiff for the use of the plaintiff." Breach, that defendants did not give plaintiff yearly or at any time during the said three years twenty tons of coals, &c.; in the terms of the contract. Held, bad for want of an averment by the plaintiff that he was ready and willing to receive the coals, and that he had named a ship on which the defendant was to deliver them. *Armitage v. Insole*, 723

2. Denial of premature allegations, 482. ACCOUNT.

3. Plaintiff's ownership, when sufficiently shown, 122. CANAL, I. 1.

II. In particular instances.

1. For abstracting water from canal for unauthorized purposes, 122. CANAL, I. 1.

2. In action for calls, 672. CALL, III. 1.

3. On bill accepted with a condition for renewal, 891. BILLS, I. 1.

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In ascertaining rateable value, 571, 587. Poon, VI.

DEED.

I. Recitals.

Effect as an estoppel: whose language they are.

By indenture between plaintiff and defendant reciting, inter alia, that defendant had advanced money to O. on the security of certain deeds, and that defendant was interested in those deeds to that extent, and that it had been agreed that plaintiff should make further advances to O., and that defendant should assign the deeds and his interest therein to plaintiff as a security, defendant assigned them to plaintiff, and covenanted that the money so advanced to O. by defendant was due and unsatisfied to him.

In an action on this deed, assigning as breach that the money was not due at the time of making the covenant:

Held, that the recital, that the money had been advanced, was to be taken as the language of the defendant only, and did not estop the plaintiff from saying that it had not been advanced.

Where a recital is intended to be an agreement of both parties to admit a fact, it estops both parties; but it is a question of construction whether the recital is so intended. *Stroughill v. Buck*, 781

II. Estoppel by.

By the recitals, 781. Ante, I.

III. Construction. CONSTRUCTION, III.

DEFAMATION.

I. Statute of limitations.

Barred by publication within the period to plaintiff's agent.

The first count, in an action for a libel, was in respect of a newspaper published more than seventeen years before action brought. The Statute of limitations being pleaded: Held, that the plea was negatived by proof that a single copy had been purchased from defendant for plaintiff, by plaintiff's agent, within the six years.

Other counts were in respect of other libels, alleged to impute to plaintiff the libellous matter charged in the first count, which was set out by way of inducement in each count. The libels themselves, in these other counts, did not refer to that in the first count. The statute of limitations was pleaded to so much of these counts as related to the matter in the first count. Held, that the plea was negatived as to these counts also; and, further, that it was not necessary to tell the jury, in estimating the damages as to such

matter, to take into consideration the fact that the only publication proved had been the sale to the agent. *Brunswick, Duke of, v. Harmer*, 185

II. Publication.

By sale to agent sent by plaintiff to buy, 185. Ante, I.

DEFENDANT.

I. How to be proceeded against when he is abroad, 446. APPEARANCE, I.

II. Co-defendant. CO-DEFENDANT.

DELAY.

See TIME.

DEMAND.

I. Letter containing.

1. Admissibility of, in evidence.

Assumpsit for money had and received. Plea: Non assumpsit. Particular of demand, for "cash received by the defendant from D., being 10s. in the pound on a debt of 52l. 5s. at one time due from plaintiff to defendant, which had been previously paid by plaintiff to defendant." On the trial, a letter from D. to defendant was received in evidence. It stated that, through an oversight, 10s. in the pound had been paid to the defendant, though the debt of 52l. 5s. had been previously satisfied by the payment of 39l. 10s. and the deduction of discount, and it requested that defendant would return the amount. No answer was sent. Evidence was given as to the payment of 39l. 10s. The judge, in summing up, said that the statements in the letter were no evidence of the truth of the matters therein stated, but that the jury might draw an inference from the defendant's silence on receiving such a demand. And he left it to the jury to say, on the whole evidence, whether the debt of 52l. 5s. was or was not discharged before the payment referred to by D. Verdict for plaintiff.

Held, on motion for a new trial, that the letter was properly received, being in substance a demand, and containing such statements only as might fairly accompany a demand: and that there was no misdirection, as the payment of a smaller sum, with discount, was a sufficient discharge of the larger debt to bear out the allegation in the particular. *Gaskill v. Skene*, 664

2. Proper contents of such a letter, 664. Ante, 1.

3. Inference from silence in respect of, 664. Ante, 1.

II. Particulars of demand. PARTICULARS.

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Place of business, 196. COUNTY COURT, II. 1.

DETAINDER.

In lunatic asylum, 349. POOR, XX. 2.

DEVISE.

I. Whether for life or in fee.

1. Absence of words of inheritance.

J. Payne, having two sons, Edward and John, and four daughters, Ann, Elizabeth, Mary, and Sarah, by his will (dated before 1st January, 1838) recited that he had surrendered, or intended to surrender, all that part of his estates which were copyhold to the use of his will. He gave to Edward and his heirs and assigns for ever all his estates lying in N., on condition of his paying an annuity to the four daughters, "or to the heirs of their body, share and share alike." He gave to John land at Stotfold and W., without words of inheritance, but adding, "I give the above to him, his heirs and assigns, for ever, upon condition" of paying an annuity to the daughters, "or the heirs of their body, share and share alike." He gave to Ann and Sarah each a cottage, without words of inheritance. "I give unto my son John the Meeting House," "if it is not made freehold, to save the expense of so many fines. But my will is for John to let Edward, Ann, Elizabeth, Mary, and Sarah have equal shares with him, the same as if it was freehold and gave amongst them. I give all the land I bought of Mr. Burton," "to Ann, Elizabeth, Edward, John, Mary, and Sarah Payne, as likewise The Meeting House and appurtenances, if it made free, share and share equally amongst them. If John refuse to let them have share of the Meeting, he to forfeit all his Stotfold estate, to be divided amongst them. I give unto Edward Payne and John Payne all the estate as I bought of Mr. Reynolds, lying in the parishes of C. and W." "equally between, on condition of their paying 10*l.* a year to my daughters, their heirs or assigns: that is to say, 2*l.* a year to Ann," &c., "their heirs and assigns for ever." The will gave special directions as to the occupation and management of the Stotfold property, as to certain pecuniary legacies and the disposal of the surplus, as to mourning, funeral, &c., and appointed a trustee and executors. The will appeared to be drawn by an uninstructed person.

Held, that Ann, Elizabeth, Edward, John, Mary, and Sarah took only an estate for life in the land bought of Burton: for that there were no words of inheritance as to this; and the rest of the will supplied no inference of an intention to give more than a life estate: especially, that the clause for forfeiture of the Stotfold estate was by way of penalty and not of substitution for The Meeting

House; and no intention therefore could be inferred that The Meeting House was given in fee like the Stotfold estate: nor, therefore, could any such inference be made as to the land bought of Burton. *See dem. Payne v. Plyer*, 512.

2. Inference from other provisions in the will, 512. Ante, 1.

II. Provisions for failure of issue.

Failure of issue entitled.

Testator J. devised lands to his wife for her life; remainder to his daughter and only child E. for her life; remainder to her eldest son R. for his life; remainder to the first son of the body of R. and the heirs of the body of such first son; and, in default of such issue, to the second, third, and every other son of the body of R., severally and successively, with like remainders over: remainder, failing such issue of R., to the second son of E. for his life, in case he should not become, or should not continue, seised of the real estates of M. D. deceased, under M. D.'s will, with like remainders over, subject to the same condition: remainder, failing such issue of the second son, to the third and every other son of E., severally and successively, with like remainders over, subject to the same condition.

It was then declared by J.'s will that, if the said second son of E. or any son of the said E., should at any time become seised of the real estates of M. D. by virtue or in consequence of his will, such son should not, nor should any heir of his body, take, have, or enjoy any estate or interest in the now devised estates, so long as he should be so seised, but the same should go over to the next in succession of E.'s sons, and the heirs of his body, as if the son so seised of the estates of M. D. were dead without issue: but that, if such last-mentioned son should afterwards become disabled by any condition in the will of M. D. from continuing to hold his estates, then, as soon as he should have quit- ted possession thereof, he should and might have, hold, and enjoy the now devised estates according to the above limitations. Then came the following clause.

Provided that, if my said daughter (E.) "shall have no issue male of her body living at her death, or no such issue male, as shall be entitled by the true meaning of this my will to my real estates hereby limited and settled as aforesaid, then and in either of those cases I devise all my said real estates, subject respectively as aforesaid, to all the daughters, if more than one, of the body of my said daughter, who shall be living at her death, as tenants in common, and their heirs respectively, with cross remainders" in case

of any one or more of them dying under the age of 21 without issue; "and, if there should be but one such daughter living at my said daughter's decease, and no issue of any other such daughter then in being, then to such only surviving daughter and her heirs." Then followed a provision for the case of daughters dying in E.'s lifetime, leaving issue: and, in case E. should have no issue of her body living at her death, devise to such person and for such estate, as E. should by deed or will appoint. Devise, for want of such appointment, and subject thereto, and to the several limitations and charges of the will, to testator's right heirs. And all the residue of his estate, not before effectually disposed of, testator gave to his said wife.

M. D., by his will (prior to that of the above testator), devised his lands to his nephew Sir J. E., Baronet, the husband of J.'s daughter E., for his life, remainder to the second and all the other sons of Sir J. E. (excluding the eldest), severally and successively, according to priority of birth, and to the heirs male of the bodies of such sons (excluding the eldest son, as above) respectively; remainders to the other nephews of M. D. in succession, with remainders to the first and other sons of each nephew, respectively, and the heirs male of the bodies of such sons, respectively: remainder to M. D.'s right heirs. *Proviso*, that, if the title of Baronet, vested in Sir J. E., should descend to his second or other son, or any person to whom the lands of M. D. were limited by his will, before or at the time when such son or person should be in possession, the whole estate and interest therein limited to him by M. D.'s will should cease as if he were dead, and the person next in remainder should be entitled to enter upon and hold such lands.

The wife of J. the first-mentioned testator entered under his will, and held for her life. E., his daughter, died in his lifetime, intestate, having, at the time of her death, two sons and several daughters living. Her eldest son entered on the death of the testator's widow, and died without having had issue. The other son of E. was already deceased, not having had issue. Several of the daughters survived, and claimed the devised estates of J., against a devisee of the elder brother.

Held that, on a correct grammatical construction of the proviso in J.'s will, the devise to E.'s daughters took effect if E. should have no issue male of her body living at her death, or if, then or at any subsequent time, she should have no such issue male as would be entitled under J.'s will; the restrictive words "living at her death" not being common to both alternatives.

And that this construction agreed with the

intentions of the testator J., to be inferred from the context of his will, the provisions in the will of M. D., and the other circumstances of the family. *Wilson v. Eden*, 256

III. Exclusion of devisee on certain contingencies.

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By payment of a smaller sum, with discount, 664. *Demand*, I. 1.

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So given as not to interfere with defendant's easement, 81. CROWN, I. 1.

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I. Making, stopping, and diverting highways.

1. Effect of alterations on liability to repair.

By an enclosure act, incorporating stat. 41 G. 3, c. 109 (the General Enclosure Act in force at the time), the Commissioners for enclosing certain common lands were authorized to stop up, divert, or alter any public ways over the waste, with the concurrence of two justices. They were also empowered to set out new ways, which, when certified by two justices to be complete, were to be repaired by the parish. Before the enclosure

act, a public bridleway led across a common. There was no definite track where the land lay open. The Commissioners ordered the common to be enclosed, and set out a road thirty feet wide, with the same termini and in the same line as the old bridleway, and in their award directed that it should be a public bridleway and a private carriage road for certain persons, who should keep it in repair. The road was set out accordingly. On the trial of an indictment against the parish for not keeping it in repair, no order or certificate of justices was proved.

Held: That the old public way was never effectually stopped; that the defined road set out was in effect the same way; and that the parish were still liable to repair it as a bridle road, and were not exonerated by the fact that it was now set out as a private carriage road also. *Regina v. Cricklade Saint Sampson*, 735

2. What not an effectual stopping, 735. Ante, 1.

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2. Grant of rent determinable on failure, 911. CROWN, II. 1.

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EXECUTORS AND ADMINISTRATORS.

I. Administration bond.

In whom vested in case of death.

A bond given to the Ordinary by an administrator, under the Statute of Distributions (22 & 23 C. 2, c. 10), passes, on the Ordinary's death, to his personal representative, and not to his successor. *Howley v. Knight*, 240

II. Of public functionaries, 240. ANTE, I.

III. Executor de son tort.

Of rightful executor.

Debt on bond by plaintiffs as executors, against defendant as executrix of one Susannah Scott, who was executrix of W. N. Plea that Susannah died intestate, without this that the defendant ever was rightful executrix of the said Susannah.

Held, on special demurrer, that the plea, though good in form, was no answer to the action, for an executor de son tort of a rightful executor is liable in the same manner as a rightful executor for the debt of the original testator. *Meyrick v. Anderson*, 719

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Effect on executor's rights.

A bill filed by a creditor of a deceased testator, for the administration of the estate under the direction of the Court, does not of itself suspend or control the executor's right to dispose of the property and make a good title.

The Courts of common law take judicial notice of this principle of equity; and evidence to show a contrary practice is not admissible. *Neeves v. Burrage*, 504

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FRIENDLY SOCIETY.

I. Locality of the Society.

Where the business is transacted in different jurisdictions.

By the rules of a Friendly society, any member rendered by illness incapable of working was to receive, as long as he continued unable to work, a weekly allowance, and was not allowed to do any kind of work except receiving or paying money, giving verbal orders, or signing his name; any member attempting to defraud the Society was to be excluded: all matters in dispute between the Society and any individual member were to be referred to arbitration; the arbitrators were to bear evidence on both sides, and their decision was to bind all parties and be final.

Justices, under stat. 4 & 5 W. 4, c. 40, s. 7, made an order, finding that it was proved before them, on oath, that J. had been a member for eighteen months; that, by the rules, disputes were to be referred as above; that, for nine calendar months, J. was by illness rendered incapable of working, and received a weekly allowance, till the Society refused to pay him, and expelled him; that a dispute thereon arose, which was referred to arbitrators in pursuance of the rules; that the arbitrators had been called on by J. to hear evidence on both sides, and to make their award, but had *wholly neglected and refused* to make such award; that J. complained to a justice, and obtained a summons against the president, who, with J., appeared before the justices making the order; and the justices by the order found the allegations to be true, and ordered J. to be reinstated in the Society.

The order was brought up by certiorari, and motion was made to quash it, on affidavit that the parties had met before the arbitrators, when evidence was given on the part of the Society, and, J., being called upon for his defence, said that the evidence was true, adding that he had witnesses as to his character (which was not in dispute), and no other witnesses: whereupon the arbitrators awarded that J. should be expelled: and that these facts had been proved before the justices.

In answer, it was sworn that J. had been charged with an act amounting to working while receiving the allowance; that he had, at the meeting before the arbitrators, tendered evidence material to the merits of the case; but that the arbitrators had refused to hear it, and had decided *ex parte* on the evidence given for the Society; and that J. had not stated as alleged in the affidavit on the other side.

Held: that the finding by the justices of the arbitrators having neglected to award

was not conclusive, that being a fact preliminary to the jurisdiction of the justices: but that, there being contradictory evidence before the justices on the question whether the arbitrators had refused to hear evidence on behalf of J., the justices were warranted in considering the refusal proved; and, if they did so consider, in finding that there was no award according to the rules of the Society; and therefore that their order was not made without jurisdiction, and was good.

It was deposed that the Society was formed within the borough of Leeds, which is within the West Riding of Yorkshire, but has a Court of Quarter Sessions, and justices with exclusive jurisdiction; that all the meetings were held, and all the business transacted, and the award made, within the borough; but that J. resided, and the act with which he was charged took place in the West Riding, without the borough.

Held: that the justices of the West Riding had jurisdiction to hear J.'s complaint and make the order. *Regina v. Grant*, 43

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I. Affidavits contradictory or explanatory of return.

1. When not allowed to be filed.

Habeas corpus ad subjiciendum. Return: Committal by order of the Vice-Chancellor of England, for breach of an injunction ordered by the Lord Chancellor. The order was signed C. C., which, it was suggested, were the initials of "COTTENHAM, Chancellor" On motion on behalf of the prisoner for time to file affidavits, for the purpose of showing that Lord COTTENHAM had a personal interest in the cause, and therefore, as the prisoner contended, that his injunction was void:

Held, That the Court will not grant time to file affidavits, for the purpose of disclosing matters not apparent on the return to a habeas corpus, unless the nature of the facts to be sworn to is suggested, and it appears such affidavits might be available.

And in this case liberty to file the proposed affidavits was refused, as the order of committal was that of the Vice-Chancellor, who had jurisdiction to decide whether there was proper ground for a committal, and this Court could not review such decision. *Re Dimes*, 554

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II. Liability to repair: apportionment in case of intersecting boundary.

1. Existence of the boundary essential to the jurisdiction.

The Highway Act, 5 & 6 W. 4, c. 50, s. 58, enacts that, where the boundaries of parishes pass across or through the middle of a common highway, justices in special sessions may, on complaint, summons, and hearing, apportion the future liability to repair between the parishes: *Provido*, that, in the case of such highway, the repair of any part of which belongs to any body politic or corporate, or to any person, by the reason of tenure of any lands, or otherwise howsoever, the same proceedings may be adopted.

Two justices made an order of apportionment under sect. 58, in the form given by the schedule, No. 14, to the statute, which form does not contain any express finding as to boundary. On appeal to the sessions against this order, evidence was heard on the question, whether or not the highway was upon a parochial boundary; the appellants denied the jurisdiction of the two justices, because, as they contended, the highway did not appear to be on such boundary: the respondents argued that, even if it were not so, the justices had jurisdiction under the proviso. The Sessions confirmed the order, but stated a case, setting forth the facts in evidence on the question of boundary, and the objection taken to the jurisdiction, and adding that, if the Court of Queen's Bench should be of opinion that, under the circumstances stated, the road could be divided, &c., by the said order of justices under the provisions of the statute, the order of Sessions was to be confirmed; if not, both orders to be quashed.

Held that, upon the case so stated, this Court, though the order of justices was made in the statutory form and confirmed at Ses-

sions, might go into the whole question raised by the case; namely, whether there was evidence of a boundary intersecting the highway, or, if not, whether, upon the evidence the two justices appeared to have had jurisdiction under the proviso.

Held that the case did not come within the enactment of sect. 58, as the evidence did not show a boundary intersecting the highway. And that the proviso did not apply. Orders quashed. *Regina v. Perkins*, 229

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Plaintiff in London contracted to buy of D. 6000 bags of rice, to arrive from Madras by the ship E. B. before the end of May: and he contracted with W. to sell him the same rice, to arrive as above, at an advanced price. Plaintiff then effected an insurance at and from Madras to London on profit on rice, laden or to be laden, and also upon the body, tackle, &c., of the ship E. B., beginning the adventure upon the goods from and immediately after the loading thereof aboard the said ship at Madras. The ordinary perils were insured against. Premium 2*l.* 10*s.* per cent. The rice was all ready to be shipped on board the E. B. and conveyed to London for plaintiff's vendors, and 1200 bags were actually on board, when, by perils of the sea, the ship was disabled, and prevented from performing the voyage, and the rice on board spoiled; and plaintiff's contracts both of purchase and sale became inoperative. In an

action by plaintiff on the policy, for a total loss in respect of 4800 bags, the insurers having settled for the 1200:

Held, by the Court of Queen's Bench:

That the plaintiff's expected profit was an insurable interest, and well insured by this policy.

And that it was not necessary to the plaintiff's right of recovery that the 4800 bags should have been actually on board; the ship having been at Madras ready to take in the cargo, and having been disabled from doing so by no cause but peril of the sea.

Held, by the Court of Exchequer Chamber, reversing the judgment in Q. B.:

That the plaintiff's interest in profit was insurable: But

That it was not properly insured by a policy in this form, except as to the rice actually put on board.

And that, if the rice on shore could have been considered a subject-matter of the insurance under this policy, the loss in respect of such rice was not occasioned by peril of the sea, within the meaning of the policy, but was only consequential upon other loss occasioned by such peril. *M'Swiney v. Royal Exchange Assurance*, 634

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V. Interest of justices.

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When an information is laid before justices of the peace for an indictable misdemeanor, it is in the discretion of the justices to hear it, or refuse to hear and leave the complaining party to originate his prosecution before a grand jury.

The Court, therefore, refused to compel justices by mandamus to hear evidence on an information (with a view to prosecution by indictment) for an alleged perjury in depositions before the Ecclesiastical Court, when it appeared that the suit in which the depositions had been made was still depending, and that the justices had therefore held it improper to proceed on the information. *Regina v. Ingham*, 396

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1. By entering under an agreement which cannot operate as a lease: terms not inconsistent with a yearly holding.

An agreement of demise for three years, executed in March 1845, in writing but not by deed, was prevented from operating as a lease by stat. 7 & 8 Vict. c. 76, and was not re-established as a lease by stat. 8 & 9 Vict. c. 106, which repealed the former act, but took effect only as from October 1845.

A tenant entered into possession of a house under such agreement, made with A. and B., paid them rent, and so became tenant from year to year to them, on such terms of the agreement as were not inconsistent with a yearly tenancy. Afterwards A. assigned all his interest in the premises to B. The tenant continued in occupation, and paid rent to B. singly. Held that, under these circumstances, it was to be presumed, in the absence of proof to the contrary, that the tenant had, in consideration of B. permitting him to continue, agreed to hold of B. on the terms on which he had held of A. and B.: and that an action lay at the suit of B. singly against the tenant for not putting the premises in repair and keeping them repaired: there being a stipulation to that effect in the agreement with A. and B., and that being a term not inconsistent with a yearly holding. *Arden v. Sullivan*, 832

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But mortuaries are not within stat. 7 & 8 W. 3, c. 6, s. 2, which authorizes justices of the peace to adjudicate upon complaints of subtraction of "small tithes, offerings, oblations," and "obventions."

Justices of the peace made an order under the last-mentioned statute, reciting a complaint that certain parishioners had refused to pay to the parties entitled the oblations, obventions, and other customary dues and payments arising, &c.; and the justices by their order adjudicated that there was due from those parishioners the sum of 10s., being the amount and value "of the said oblations, obventions, and other customary dues and payments which have become due," &c., "from them," &c., and ordered them to pay the said sum, &c. In an action of trespass for a distress made under the order:

Held, that evidence was admissible to show that the 10s. were claimed before the justices in respect of a mortuary; there not being, on the face of the order, any finding of fact by which that extrinsic evidence was excluded.

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The specification of a patent is defective if the patentee professes to effect his object in one of two specified modes or else in the other, representing each as available, and it appears by evidence that one of them will effect the purpose, but the other will not. *Regina v. Cutler*, 372 n.

II. Pleading.**1. Explanation by drawings.**

A plea which refers for explanation to drawings, not traced on the record but annexed to it, is inadmissible; and the Court, on motion (where the pleading related to the specification enrolled by a patentee), ordered such plea to be struck out.

Whether such plea would have been allowable (unless by consent) if the drawings had been traced on the record, *quære*.

In an action for infringing a patent, the defendant, after pleading that the patent was granted on a representation that the invention was an invention of improvements in a specified article, whereas it was not an invention of improvements in such article, and so the patent was void, averred, by another plea, that the supposed invention was not of such use, benefit, and advantage to the public as by law required to make it a consideration for granting a patent, whereby the patent was void. The Court, on motion, struck out the latter plea.

In an action for infringing a patent, if the defendant's notice of objections under stat. 5 & 6 W. 4, c. 83, s. 5 (see stat. 15 & 16 Vict. c. 83, s. 41), is too general to give such information as the plaintiff is entitled to, it is no answer to a motion for better notice that the notice is as specific as the pleas. *Bette v. Walker*, 363.

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V. Exemptions from rate: literary societies: appeal against certificate.

Order of Sessions.

On appeal against a certificate given under stat. 6 & 7 Vict. c. 36, to exempt a Literary Society from rates, the Sessions quashed the certificate by an order reciting that, "Whereas A., of," &c., "in the parish of B., presented his petition and appeal, setting forth that by a certain certificate" he, "as a parishioner and ratepayer of the said parish," in which the society was situate, "conceived himself aggrieved." The order was removed by certiorari, and a rule obtained to quash it, on affidavits that the Sessions had decided erroneously on a preliminary objection.

Held, that it was not competent to raise such a question in this form.

Held, also, that it sufficiently appeared by the order that the appellant was assessed to rates from which the Society was exempted; and that the order was good on the face of it.
Regina v. Stacey, 789

VI. Rateable value: deductions.

1. What salaries and collateral expenses not to be deducted.

By stat. 6 & 7 W. 4, c. cxxxvi., incorporating The London Cemetery Company, the Company were required periodically to appoint directors, who should manage the business and concerns of the Company (subject to their control), keep and use the common seal, have the custody of books, deeds, &c., call meetings, purchase and sell lands, appoint and displace chaplains and other officers, allow them stipends, take of them securities, make contracts touching the Company's undertaking, regulate the mode of interment and the disposition of vaults, catacombs, and graves, and the sums to be paid for exclusive right of burial therein and for placing monuments, &c., direct the issuing, receiving, and disposal of the Company's moneys, and all their other dealings, superintend their correspondence and the keeping of their accounts, and do all other things necessary for carrying on their business and maintaining actions or suits in their name in respect of debts or contracts, &c., relative to their moneys, &c., and making, enforcing, and rescinding contracts, &c.: Also auditors who should examine the report, to be made by the directors, of disbursements and receipts, audit the accounts from which the report was drawn, and inspect the vouchers, &c.

The Company had two cemeteries, in Middlesex and Surrey. The duties and authority of the directors extended to both.

On appeal by the Company against a poor-rate on one of the cemeteries:

Held, That they were not entitled to deduct from the rateable value under the Parochial Assessment Act, 6 & 7 W. 4, c. 96, s. 1, the salaries of the directors and auditors, and the expenses of an office, in London, at which the directors transacted the Company's business.
Regina v. St. Giles, Cumberwell, 571

2. Personal remuneration to directors.

On appeal by the Southampton Dock Company against a poor rate, and case stated for the opinion of this Court, the appellants claimed deductions from the amount at which the rateable value of their property was assessed, as follows. (It is not thought necessary to state the first head.)

2. For the expenses of a steam tug, alleged by them to be part of their movable plant, but by the respondents to be independent of the dock establishment. The Company were authorized by their local Act, 6 & 7 W. 4, c. xxix., to build, purchase, or hire steam tugs for the purpose of towing vessels into or out of the docks from or to Southampton Water, &c., or any part of the British Channel, and to pay the expense out of the rates, rents, and sums receivable under the Act. The steam

tug was used for the above purpose, and was found by the case to be a useful appendage to the docks and advantageous to those frequenting them, and conducive to the general profit of the concern, though not indispensably necessary, as other steam vessels might have been hired and employed, but with less convenience and advantage.

Held, that the deduction was allowable, the steam tug being ancillary to the dock undertaking.

3. A "personal remuneration" to directors for their trouble, expense, and exercise of skill and judgment in managing the Company's business, independently of interest (5 $\frac{1}{2}$ per cent.) and tenant's profit (20 per cent.). The directors, sixteen in number, being proprietors of the Company, were elected periodically under the Act, and were to have the general management and control of the business and concerns of the Company, keep and use the common seal, have the custody of books, deeds, &c., direct investments and sales, and the calling in and laying out of moneys, &c., and all other the dealings of the Company, call meetings, superintend correspondence and the keeping of accounts, ascertain dividends, &c.; and, by a separate clause, they were empowered to direct and employ the works and workmen, regulate the use of the docks and the amount of rates, rents, &c., to be taken, appoint and displace bankers, solicitors, officers, and workmen, &c., and fix their salaries. An allowance had, in former years, been made to the directors for their services, but it had recently been waived by them, on account of the smallness of the Company's dividends.

Held, an allowable deduction.

4. Cranes, steam engines, shears, and other heavy machinery, attached to the freehold and essential to the business, but capable of being detached as easily and with as little injury to the freehold as other fixtures put up for the purposes of the tenant's trade and usually valued as between incoming and outgoing tenant.

Held, not an allowable deduction.

5. The income tax which a tenant would have to pay on his net profits after payment of his rent.

Held, not an allowable deduction. *Regina v. Southampton Dock Company*, 587

3. Steam tug ancillary to undertaking, 587. Ante, 2.

4. Not the supposed tenant's income tax, 587. Ante, 2.

5. Not fixtures increasing the value of the occupation, 587. Ante, 2.

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VIII. Scotch and Irish poor.

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IX. Settlement generally.

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X. Birth settlement.

Children of Irish parents.

The children, born in England, of an Irish father and an Irish mother became chargeable, while under the age of sixteen, after the father had deserted them and the mother had died.

Held, that they were removable to the parish of their birth, notwithstanding stat. 8 & 9 Vict. c. 117, s. 2; that enactment not making English born children removable directly, but only as part of the family of a parent who is removed. *Regina v. All Saints, Derby*, 207

XI. Settlement by estate.

1. Equitable right acquired for less than 207., followed by conveyance for more.

A building club was formed by subscribers to an indenture, which recited the purpose to be raising a capital stock for erecting dwelling-houses; and they agreed to articles, which provided: That every subscriber should pay 6s. 8d. monthly: freehold land was to be purchased by the club for erecting houses: each member to take as many houses as he should have shares: the houses to be built according to a plan annexed, and under the inspection of the agents of the Society: the order in which the members should take the houses to be determined by lot, till all the shares should be drawn: no member to mortgage his house till the conclusion of the Society, but each to pay rent to the officers, which was to be deemed a vesting of property in them: no subscriber to have power to let or sell his house till security should be given to the satisfaction of the president: the monthly payments and rents to be placed to the funds of the Society till the whole subscriptions should be completed and all the dwelling-houses be allotted, and possession of them given to the respective subscribers; the president meanwhile to have the power of distraining for the rent: if a member, after being put in possession of a house, should lock his door, quit the neighbourhood for six months, and neglect to pay his monthly payments and rents, the president and steward might take possession of the house and let or sell it: at the determination of the Society, each member was to be fully entitled to his share, and a conveyance thereof at his own expense; the surplus stock to be divided; and meanwhile each member to pay 1 $\frac{1}{2}$ yearly, and to forfeit his share upon making default of any of the payments provided for: the Society not to be broken up while six

members existed, or before all the buildings should be completed.

The club contracted for the purchase of land, and commenced building without any conveyance being made to them. The land was afterwards, by deed to which the club was party, mortgaged to A. for money advanced to the club. The whole purchase-money paid by the club amounted to more than 30*l*., but not to so much as 30*l*. for each subscriber. In 1824 and 1825, E., a member of the club, drew his share, had a house built for him, and entered into possession; and he paid rent till the mortgage was paid off, when the mortgage conveyed the house to E. and the other members severally. The club had shortly before ended, the shares having been paid up and the houses built. At the time when the club ended, E.'s monthly and annual payments, exclusive of rent, exceeded 30*l*.; but such payments made before he came into possession did not amount to 30*l*. The house was not of the annual value of 10*l*.

Held that E. acquired a settlement by residence in the house after the conveyance to him, not having had any legal or equitable estate until the time of such conveyance, and having before that time paid more than 30*l*., so as to satisfy stat. 9 G. 1, c. 7, s. 5. *Regina v. Curton*, 110

2. Share in building club, 110. *Ante*, 1.

3. Equitable right, 110. *Ante*, 1.

4. How to be stated in grounds of appeal.

On appeal against an order for maintenance of a lunatic pauper, under stat. 8 & 9 Vict. c. 126, s. 62, by a parish adjudged to be the last place of legal settlement, the grounds of appeal stated a settlement by reason of the pauper's mother being entitled to and in possession of a freehold tenement situate in the respondent parish, and having resided there for forty days up to and at the time of the order, the pauper being unemancipated. It was not stated whether the estate was purchased, or how acquired. Held that, upon grounds so generally stated, the appellants could not prove that the mother had purchased a freehold estate in the parish, and resided thereon.

On such an appeal, it is not a good objection to the order, that the lunatic pauper was not brought before the justice by warrant from him after notice from the relieving officer, according to stat. 8 & 9 Vict. c. 126, s. 48, the enactments in that respect being directory only, and the justice having jurisdiction, in whatever way such lunatic pauper is brought before him. *Regina v. Rhyddlan*, 327

XII. Settlement: acknowledgment by relief.

1. Request by clerk of union as evidence against a township therein comprised.

The clerk to the Guardians of W. Union, comprising, among other places, the township of Wigan, wrote to the Guardians of L. Union, stating that he was directed to request them to relieve, on account of the W. Union, certain paupers resident in the Union of L. and chargeable there. The clerk added a schedule, stating, among other particulars, that the paupers were settled in Wigan. The L. Union thereupon advanced money to the paupers, and the sum was repaid to them by the clerk of W. Union.

Held, on appeal against an order of removal to Wigan, that these facts were *prima facie* evidence of an acknowledgment by Wigan that the paupers were settled there, without proof of a written order by the W. Guardians, and without further evidence of the circumstances under which the clerk was directed to write. *Regina v. Wigan*, 287

2. Of what it is an acknowledgment, 611. *Post*, XXXIII.

XIII. Residence under certificate.

What conduct of settlement parish is an admission of the certificate.

Examinations before two justices removing a pauper from parish B. to parish W. showed that the pauper was a bastard born, before 1834, in a third parish, C.; that his mother was at the time of his birth settled in W.; that before her confinement the overseers of C. told her that she should not stay there unless a certificate from parish W. was obtained; that after this the overseer of W. took her to affiliate the child, and gave her relief whilst she remained in C.; and that parish W., for six years, supported the pauper in C. after the mother had left C. On appeal against the order of removal, the Sessions stopped the case, on the ground that the examinations disclosed a *prima facie* birth settlement in C., and that no certificate from W. to C. was produced, nor any evidence given that such certificate was lost.

Held, that the conduct of the overseers of W. was evidence of an admission by that parish that there existed such a certificate as was required to settle the pauper in W.: for that an admission of the effect of a written instrument by a party to a cause supersedes the necessity of producing or accounting for such instrument, equally whether the admission be made in words, or be inferred from acts. *Regina v. Basingstoke*, 611

XIV. Orders on taking off suspension.

When bad for not showing that they are made within the jurisdiction.

Justices, by a regular order, having the county as venue, removed a pauper to his settlement; and they, at the same time, by endorsement on the order of removal, sus-

pended the execution on account of his illness. Afterwards one of the same justices and another justice, by order endorsed on the first order, directed a removal; and, by a contemporaneous order, similarly endorsed, they directed payment of expenses. The last two orders did not, either by venue in the margin or statement in the body, show that they were made in the county.

Held, that they were bad for this fault; and they were quashed on certiorari.

Stat. 12 & 13 Vict. c. 45, s. 7, which enacts that no objection on account of any omission or mistake in an order shall be allowed on return to a certiorari, unless specified in the rule for issuing the certiorari, does not apply where the rule for a certiorari has been made before the time fixed for the statute coming into operation. *Regina v. Crossan*, 221

XV. Notice of chargeability.

Whether necessary, and what sufficient, on orders for maintenance of lunatics, 349. Post, XX. 2.

XVI. Lunatic poor: removal to asylum.

1. Order not removable by certiorari.

When a pauper lunatic has been removed to an asylum by an order under stat. 8 & 9 Vict. c. 100, s. 48, justices may adjudicate upon the settlement, under stat. 8 & 9 Vict. c. 126, s. 58, and an order may be made upon the parish of the settlement, under stat. 8 & 9 Vict. c. 126, s. 62, for payment of expenses.

Such order of removal cannot be brought up by certiorari.

If it be so brought up, the objection to the certiorari may be taken on the return.

It is no valid objection, that the order for payment of expenses sets forth the order of removal, and the adjudication of the settlement, by way of recital, without finding that the statements in such order and adjudication are true.

The order may be for payment of a sum specified as reasonable at the time of the order, "or such other weekly sum as the proprietor of the said house shall hereafter, and from time to time, reasonably charge."

The order for payment being brought up by certiorari, it is no valid objection, that the order of removal appears by affidavit to have been given by a clergyman who was not the officiating clergyman of the parish from which the removal was made.

Nor that it does not appear by the order of adjudication that, before adjudication, any notice was given to the parish in which it is adjudged that the pauper is settled.

Nor that the order for payment recites an adjudication that the parish "was the place of the last legal settlement" of the lunatic, without further stating the time of the settlement.

Nor that such order does not state the pauper to have been chargeable to the parish from which he was removed.

Nor that the removal is to a private licensed asylum, but it does not appear that there is no county asylum or that such asylum is full.

Regina v. Hatfield Peveler, 298

2. By clergyman not the officiating clergyman, 298. Ante, 1.

3. To private licensed asylum, 298. Ante, 1.

4. Jurisdiction in whatever way lunatic is brought before justice, 327. Ante, XI. 4. 349. Post, XX. 2.

5. Difference in regard of expenses between removal by justice and removal by clergyman, 340. Post, XX. 1.

XVII. Lunatic poor; expenses of examination and removal.

1. When order may be made.

Sect. 58 of stat. 8 & 9 Vict. c. 126, which empowers justices to inquire into and adjudicate upon the settlement of "any pauper lunatic confined or ordered to be confined" in a lunatic asylum, authorizes the proceeding only during the time while the pauper remains in confinement, and the time between the order for his being confined and the beginning of his confinement.

And, if an order for maintenance, under sect. 62, be made on a parish as the last place of a pauper lunatic's settlement, and the adjudication has taken place after the pauper was discharged from the asylum, the order is bad, though the discharge was within twelve months from the beginning of the confinement.

Semble, per COLERIDGE, J., that an order under sect. 62, directing payment of the expenses of examining and conveying the lunatic to the asylum, may be made more than twelve months after those expenses have been incurred. *Regina v. Wolverhampton*, 313

2. The order may be made after twelve months.

By stat. 8 & 9 Vict. c. 126, s. 62, when a pauper has been sent by order of justices, &c., to a lunatic asylum, and is afterwards adjudged to be settled in a parish or union other than that from which he was sent, two justices may make an order upon the guardians or overseers of the first-mentioned parish or union for payment to the guardians or overseers of the other parish or union of all expenses "incurred by" them "in or about the examination of such lunatic, and his conveyance to the asylum," "and of all moneys paid by" them to the proprietor of the asylum "for lodging, maintenance," &c., "of such lunatic, and incurred within twelve calendar months previous to the date of such order."

Held that the limitation to twelve months applies to the expenses of lodging, maintenance, &c., but not to those of examination and conveyance. And an order for payment of both classes of expenses, not showing when any part had been incurred, but only that they had been paid within the preceding twelve months, was, on certiorari, quashed as to the expenses of lodging, maintenance, &c., but not as to those of conveyance and examination.

When orders have been returned to a certiorari, and their validity is argued on the return, it is too late to urge that the objections to the order were not specified in the rule for a certiorari. *Regina v. Winster*, 344 See also 318. Ante, 1.

3. Order on treasurer to pay himself, 793. Post, XX. 3.

XVIII. Lunatic poor: medical certificate.

1. Effect of variations from statutory form, 349. Post, XX. 2.
2. Inferences as to qualification and residence, 349. Post, XX. 2.
3. Effect of irregularities in fact, 349. Post, XX. 2.
4. Consequence of keeper receiving lunatic without, 349. Post, XX. 2.

XIX. Lunatic poor: order of adjudication of settlement.

No appeal lies.

No appeal lies against an order of justices under stat. 8 & 9 Vict. c. 126, s. 58, determining the place of settlement of a lunatic pauper confined under the provisions of that Act. *Regina v. St. Mary, Southampton*, 815

XX. Lunatic poor: order of maintenance.

1. When to be made on the Union.

Stat. 12 & 13 Vict. c. 103, s. 5, which throws, in certain cases, the expenses of removing a pauper lunatic to an asylum, and maintaining him there, on the Union comprising the parish which would be liable but for the statute, applies only when the lunatic has been placed in the asylum under an order of justices: not when he has been removed under the order of an officiating clergyman and a parish officer. *Regina v. St. Leonard's, Shoreditch*, 340

2. When sufficient without formal finding of chargeability.

It is no valid objection to an order of maintenance made, under stat. 8 & 9 Vict. c. 126, s. 62, on a parish adjudged to be the last legal settlement of a pauper lunatic confined in an asylum, that the lunatic is not, on the face of the order, found to be chargeable to the parish whence he was removed, if the order shows that in fact the lunatic has been main-

tained in the asylum at the expense of such parish.

Nor that notice of such chargeability has not been sent to the parish on which the order is made: and, if this were necessary, it would be enough to send the examinations on which the order was made, if they show the chargeability.

Nor that the medical certificate, annexed to the order for removal to the asylum, varies from the form in Schedule (E) No. 1 of stat. 8 & 9 Vict. c. 126, in not stating the place of abode of the person signing it, or that he was a fellow or licentiate of the College of Physicians, or a graduate in Medicine, or a member of the College of Surgeons, or an apothecary authorised by the Apothecaries' Company.

The confinement of the lunatic does not become unlawful by reason of such irregularity, where it does not appear that there was in fact no qualification, or that the residence was in fact not known: and the existence of the qualification, and the fact of the residence being known, may be inferred from the examinations.

The confinement existing de facto, and not being unlawful, the jurisdiction of the justices to adjudicate on the settlement, and to make an order of maintenance, arises.

The keeper of the asylum incurs responsibility by receiving the lunatic without a regular medical certificate; but, having so received him, is bound to continue the confinement until the lunatic is discharged. *Regina v. Minster*, 349

3. Order on treasurer to pay himself on behalf of another township in the Union.

A pauper lunatic was sent by a justice from the township of A. in the Union of W. to the county Asylum; and the justice made an order upon the treasurer of the guardians of the Union for payment of the expenses. Subsequently, two justices adjudicated that the settlement of the lunatic was not in A., but in township W., also in the same Union of W.; and the two justices, by an order reciting the above facts, ordered the treasurer of the Union, on behalf of such parties as the law required, to pay himself, out of any moneys that might be in his hands, the expenses already incurred on behalf of A.: and likewise to pay the future expenses.

Held: That the order was good in substance, as an order was required, under the circumstances, to justify the treasurer in paying as on behalf of W. And that the form, requiring him to pay to himself, as above, was correct. *Regina v. East Ardsley*, 793

4. Notice of chargeability, 349. Ante, 2.
5. Defects in medical certificate, 349. Ante, 2.

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XXI. Appeal: statement of grounds, 327. Ante, XI. 4.

XXII. Appeal: abandonment of appeal, after entry and respite; costs; form of judgment, 425. Post, XXIII. 1.

XXIII. Appeal: judgment and costs.

1. Distinction between dismissal of appeal and confirmation of order.

Appellants entered and respite an appeal against an order of removal, but did not deliver grounds of appeal. Afterwards they gave notice of abandoning their appeal, but did not satisfy the respondents as to costs. The respondents, therefore, went to the next Quarter Sessions, and moved (the appellants not being present) that the order might be confirmed. The Sessions (after stat. 11 & 12 Vict. c. 31) confirmed the order of removal, and awarded costs to be paid by the appellants to the respondents.

Held, on certiorari and motion to quash, that, although the confirmation was an excess of authority, the order of Sessions was valid as to the award of costs. *Regina v. Over*, 425

2. Order of Sessions not quashed when costs same either way, 425. Ante, 1.

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- I. As against wrongdoer, 65. TRESPASS, II. 1.
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- I. Statutory.

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Declaration in prohibition recited that plaintiff was not impropriator or proprietor of the tithes "in the parish of T." and "the said T. had not been, nor was" a parish; and the chancel mentioned in the articles after set forth did not belong to the impropriate rectory in the articles mentioned; and plaintiff had not possession of the chancel. That there was (1) a custom in T. that the inhabitants should repair the chancel; (2) also a custom that, when repairs to the chancel had been necessary, the chapel-wardens of the chapelry had ordered and paid for the repairs, and plaintiff had not repaired or paid; (3) also a custom that church or chapel rates for the repairs of the church or chapel of T. had been made, collected, and expended within T. by the chapel-wardens thereof, and the repairs of the chancel paid for out of such rates by the chapel-wardens; (4) also a custom that the chapel-wardens had yearly passed their accounts to the inhabitants of T. of the moneys collected and expended by them on account of the church or chapel rates of T. It was further recited, that such tithes of T. as arose to plaintiff had always been collected by a person appointed by the tithe-payers within T., which person had been rated to the church and other rates of T.; and the chapel-wardens of T. had been paid such rates, or deducted them from the tithes receivable by plaintiff: That plaintiff had agreed with the tithe-payers of T. to accept a certain sum in lieu of the tithes of T. arising to him, the remainder of such tithes to remain uncollected, and to be taken in lieu of all church and other rates due from plaintiff within T.; which agreement had for many years been acted upon. That defendants caused a suit to be promoted against plaintiff

in the Arches Court of Canterbury, wherein they articulated (among other things) that he was impropriator of the tithes arising "in the parish of T. aforesaid," which were sufficient for the repair of the chancel of the "parish church of T.;" that he was in possession of the chancel; that it was dilapidated by his default; and that he had been required by the churchwardens to repair it, but had refused: That to this libel defendant put in a negative issue, denying the allegations of the libel on articles, and also brought in his responsive allegation, which was duly admitted, and did thereby "allege the said several customs and matters in the introductory part of this declaration mentioned, in answer to the said libel on articles, and the said charge therein contained; and did then and there offer to prove the same in due form of law;" yet defendant threatened to, and would, "prosecute the trial of the said several customs and matters in the introductory part of this declaration mentioned in the said Court Christian," unless writ of prohibition, &c.

Defendants pleaded only a traverse of allegation (1) of custom: and a traverse of allegation (3) of custom. On these traverses issues were joined, which were found for defendants.

On motion for judgment, non obstante veredicto. Held:

1. That the pleas were not bad for omitting to traverse the allegations (2) and (4) of custom, these being immaterial, or merely incidental to and evidence of the allegations of custom traversed.

2. That the pleas were an insufficient answer, inasmuch as they did not meet the allegation that T. was not a parish, which was a fact not triable by the Ecclesiastical Court.

3. That there ought, therefore, to be a repleader, but not a judgment non obstante veredicto, inasmuch as, the plaintiff not having proved the allegations traversed, there was no admission on the record of the allegations not traversed. *Duke of Rutland v. Bagshaw*, 869.

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Stat. 5 & 6 Vict. c. 54, s. 7, enacts that, when the Tithe Commissioners are preparing their award under stat. 6 & 7 W. 4, c. 71, if any agreement for commutation of tithe, &c., shall, previously to that Act, have been made, which is not of legal validity, but appears to the Commissioners to give a fair equivalent for the tithe, &c., they shall be empowered to confirm such agreement; and, if the equivalent be not fair, they shall nevertheless be empowered to confirm, and to award such rent-charge as will make up a proper equivalent, and, subject to such confirmation and award, to extinguish the right to tithe.

Held that this clause is imperative, and not merely permissive, if the agreement be such in its nature and circumstances as the clause was meant to comprehend.

An agreement was made in 1697, between the impropriator of a parsonage, the vicar, and certain landowners of the parish, whereby the tithes and glebe were commuted for allotments of land and annual payments. Some of the landowners, parties to the agreement, refusing to fulfil it, the others filed a bill of equity against them, and, on their submission, a decree was made in 1699, confirming the agreement. In 1707 an additional agreement was made, for a further yearly payment to the vicar, in lieu of small tithes. The agreements were not in themselves legally valid, for want of proper parties, and from other defects. Allotments were made and accepted, and the annual payments rendered and received, down to 1812. A vicar was inducted in 1796, and received his stipulated payment down to 1811, in ignorance of its origin, which he then discovered, and thereupon immediately gave the landowners notice of determining such payment. Part of the land allotted to him in lieu of tithe had never come to his possession; the rest he offered to give up. On the expiration of his notice, he filed a bill against certain of the landowners for subtraction of tithe, praying an account. They alleged in defence the decree of 1699, the agreement of 1707, and the subsequent performance; but an account was decreed, and the defendants then paid five years' arrear of tithe. In 1819 the impropriator filed a bill against the vicar; in that suit the agreements were relied upon and disputed, and the bill was dismissed by a decree, which was confirmed on appeal. A tenant of the impropriators, who had withheld his tithe while these proceedings were pending, then paid his arrears to the vicar. Neither

of the agreements was acted upon, so far as they related to the vicar, after 1812.

Held on mandamus, and demurrer to return, that agreements so circumstanced were not such as the Legislature, in stat. 5 & 6 Vict. c. 54, s. 7, intended the Commissioners to confirm, and that, to a mandamus requiring them so to do, the above facts were a sufficient answer.

The mandamus required the Commissioners to confirm the agreements, and also to decide certain suits, and adjudicate on certain questions relative to claims of tithe by the impropriator and vicar. Held that the mandamus, being bad as to the confirmation, was invalid altogether. *Regina v. Tithe Commissioners*, 459

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Held, that there was no implied warranty by the plaintiff that he had title, nor any failure of consideration; the plaintiff having paid the 23*l*. to the defendant, not for the goods, but for the right which defendant had acquired by his purchase; and that this consideration had not failed. *Chapman v. Speller*, 621

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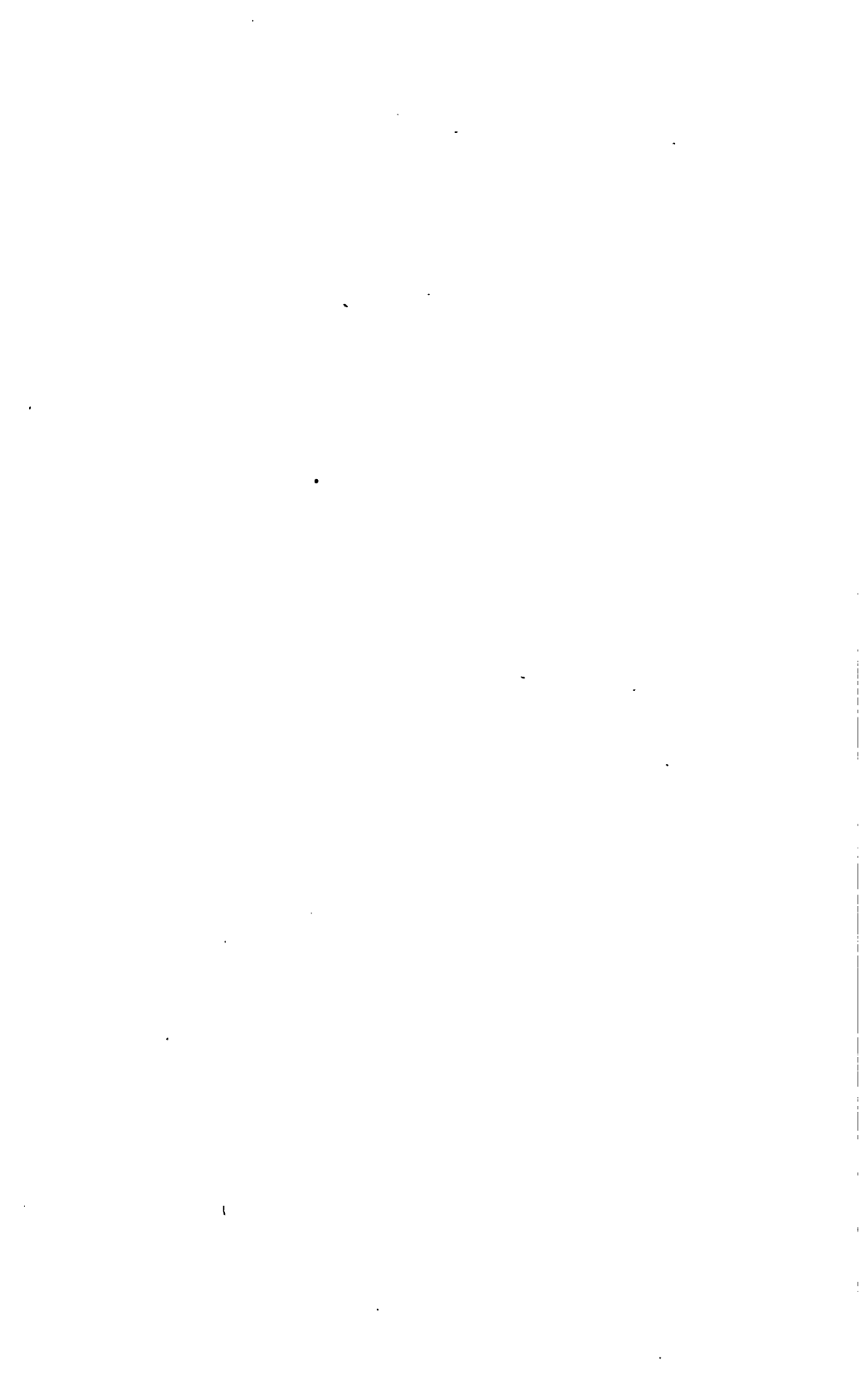
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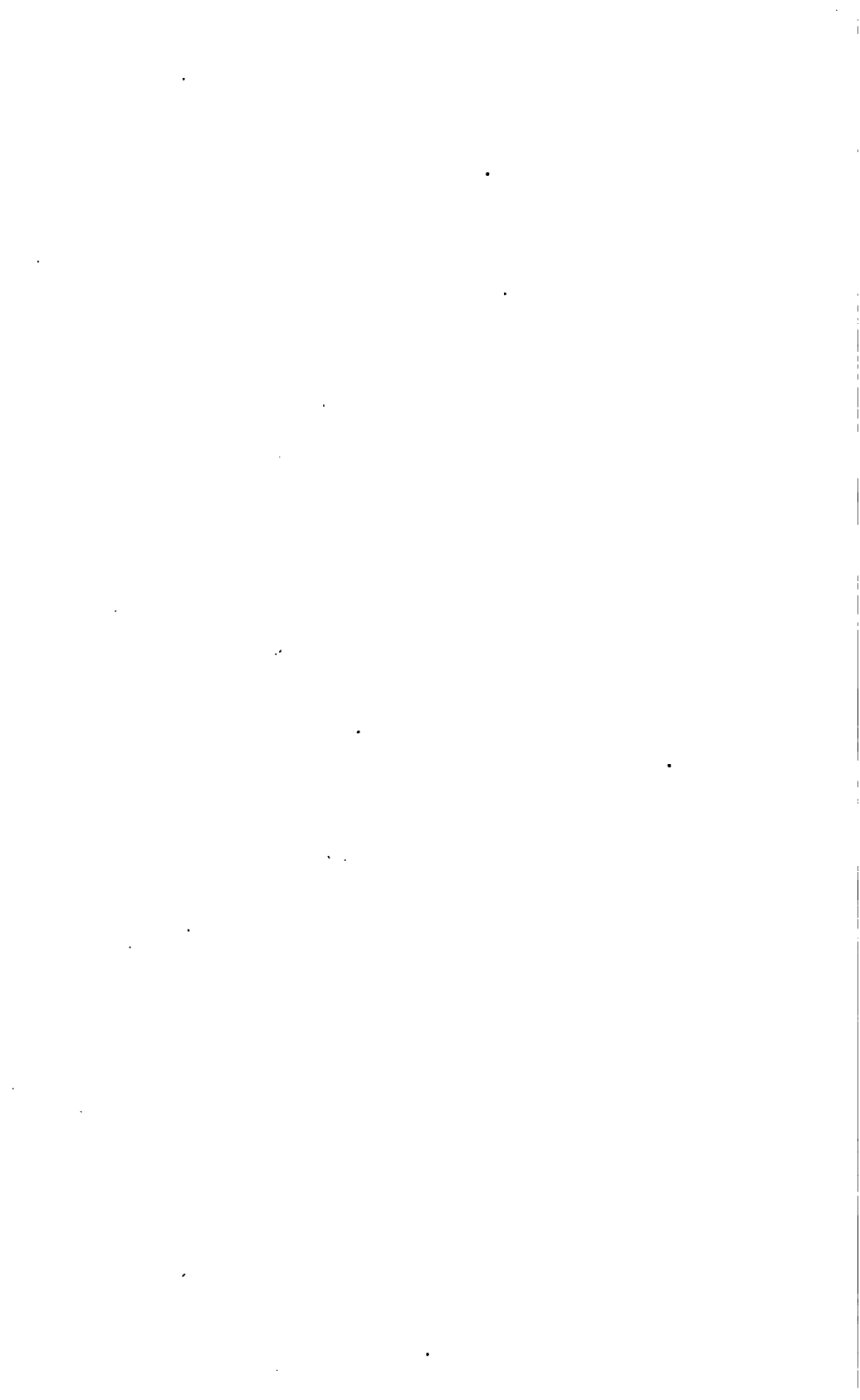
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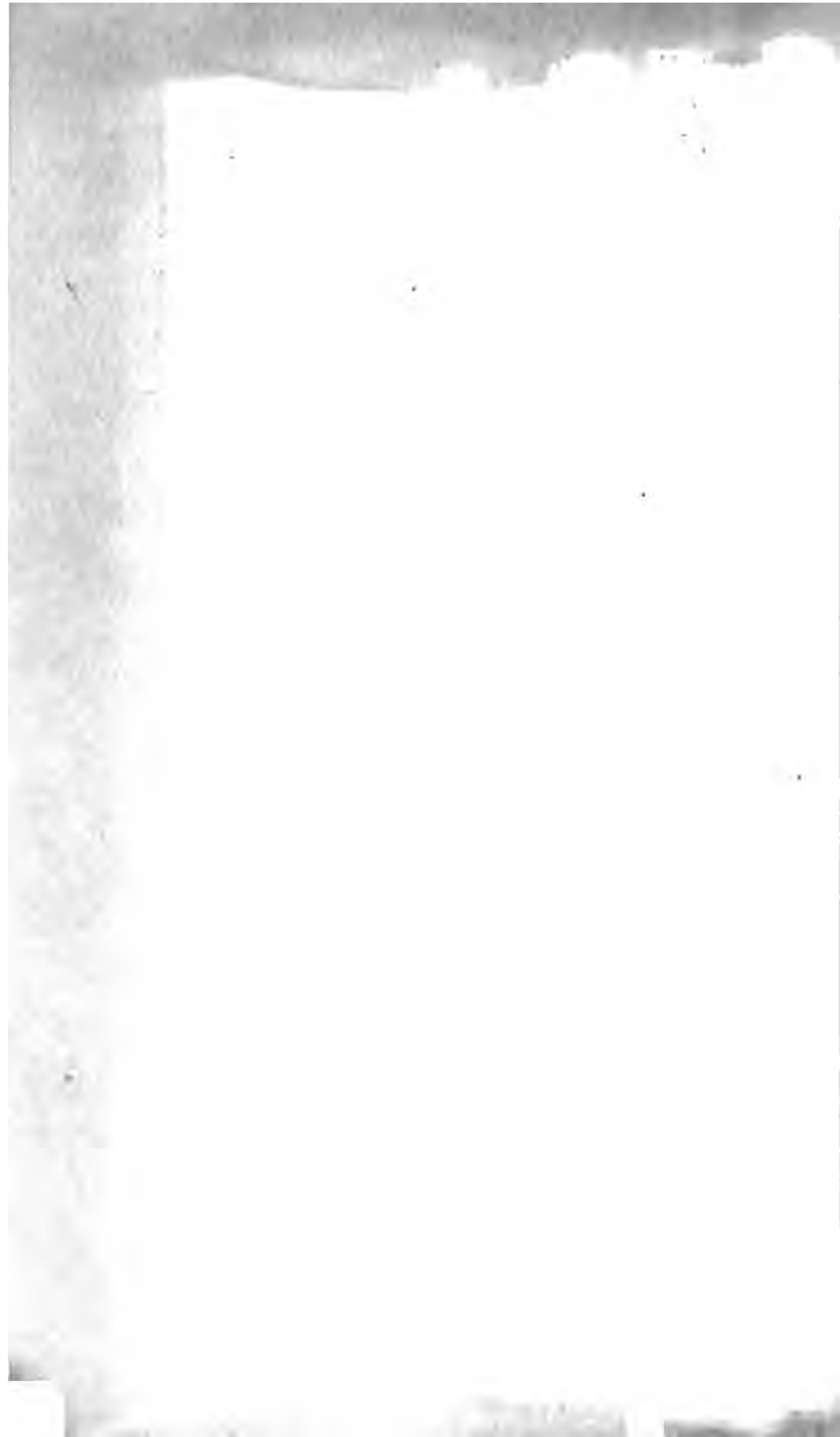












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